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The remarks of Mr. Justice Brewer, before the American Bar Association, regarding delays in the administration of the law, are deserving of attention. Mr. Justice Brewer says that while the administration of justice would soon be considered a mockery if first impressions controlled every case, yet greater expedition could be attained without detracting from the fullest examination of every case. He suggests that the time of process be shortened; that the right of continuance be curtailed; that when once a case has been commenced the right to interfere or to take jurisdiction of any matter that can be brought by either party into the pending litigation be denied to every other court; that the right of review be limited; that all review be terminated in one Appellate Court, and that instead of assuming that injury was done if error be shown, the party complaining of a judgment or decree be required to show affirmatively that if the error had not been committed the result must have been necessarily different. What he has to say in reference to criminal cases, appears more radical. He suggests that in criminal cases there should be no appeal, and that while he says it with reluctance, a jury could be trusted to do justice to the accused with more safety than an Appellate Court to secure protection to the public by the speedy punishment of a criminal. Tardy justice, he insists, is often gross injustice. This suggestion, in relation to the finality of criminal trials in the first instance, may be expected to give rise to considerable criticism, though there can be no doubt that the right of review in criminal cases has been and is being seriously abused to the detriment of the general public.

The rights of bicyclists have again been successfully asserted in a recent case tried before a Pennsylvania *nisi prius* court, the value of the opinion being, of course, simply argumentative. The suit was one for damages brought by a wheelman against a teamster, who drove his heavy wagon against the wheel and smashed it. The wheel was left in the street against the curb, while the owner went into a house. On the trial the court, in explaining to the jury the law bearing upon the case, set forth beyond all cavil the rights of bicyclists upon the public thoroughfares. They have no right upon sidewalks at all, any more than have other vehicles, but they have the same rights upon highways and streets that all other conveyances have. If one is left leaning against a curb stone, the man who runs into and damages it does so at his peril. Upon the streets a wheelman is entitled to his share of the roadway, and the man who negligently or recklessly runs him down must answer to the law. Upon the strength of such a charge as that, the jury promptly returned a verdict for the owner of the wheel.

The Supreme Court of Oregon has been justly criticised for its opinion in the late case of Schmidt v. The Oregon Gold Mining Company, 40 Pac. Rep. 406. The decision is an extraordinary one and it is difficult to understand how a reputable court could have fallen into so grievous an error. The legal proposition laid down is that in cases where it is provided by contract of loan on mortgage, that judgment upon foreclosure may be taken also for costs and attorneys' fees, that attorneys for the mortgagee may take a decree in their own favor for the amounts claimed against their clients as fees, may have the amount of compensation fixed and made a first lien on the amount recovered, without notice to their clients or giving their clients an opportunity to be heard. The record of the case shows to what abuses this remarkable deliverance may lead. A parcel of property sold for $9,000, the attorneys took $5,500 and after other costs were paid, the mortgagor received but a little over $2,500. The interest simply was in default and the mortgage was therefore subject to foreclosure, but the attorneys, instead of taking a decree in favor of their clients, took it in their own favor and against their clients for the amount claimed as fees, insisted upon it as the first lien and were upheld by the Supreme Court of the State, which affirmed the action of the lower court, and holding that relief could not be given the injured mortgagee upon appeal. It is to be hoped that the decision will not be followed as a precedent by other courts.

NOTES OF RECENT DECISIONS.

RELIGIOUS SOCIETIES—RULES OF GOVERNMENT—RES JUDICATA — ENFORCEMENT BY COURTS OF LAW.—The Supreme Court of Nebraska in Pounder v. Ash, 63 N. W. Rep. 48, decided a very interesting case on the subject of the conclusiveness of the decrees of an ecclesiastical tribunal acting within the bounds of its authority, and the power of the courts of law to enforce such decrees by appropriate proceedings. It held, overruling its former decision, in 36 Neb. 564, 54 N. W. Rep. 847, that when charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest tribunal of the church organization before which the matter has been presented, has been deposed from the ministry, and expelled from membership in the church, the courts of law will recognize such a judgment of the church tribunal, and enforce its observance, when regularly brought to their notice; and in an action for the purpose, will enjoin the one against whom it was rendered from further acting in the capacity of a minister, or enjoying the rights of a member of the particular church organization; and, when it further appears that the church property was conveyed to the organization or its trustees for church purposes, and in such a manner that it is subject to the control of the general association or governing power of the church, and its rules and laws, will also enjoin such person and member of the local congregation, or any others who have combined with him, from excluding from the church building and property, and from its use for any proper purpose, or from disturbing, in or during such use, any parties or ministers appointed to take charge of the congregation and church, by the then recognized and appointive power, disclosed to be such by the evidence in the case, or in so excluding and disturbing a presiding elder of the church from or in its proper occupancy or use, or any members in good standing who desire to worship therein in a regular manner, and according to the established rules and ordinances of the church.

FOREIGN ATTACHMENT — JURISDICTION OF CHOSES IN ACTION—PRIORITY OF LIENS.—In National Fire Ins. Co. v. Chambers, 32 Atl. Rep. 663, decided by the Court of Chancery of New Jersey, complainant, a fire insurance corporation, created by the laws of Connecticut, and doing business by an agent in New Jersey, and also in Pennsylvania, and having voluntarily subjected itself to suit in the Pennsylvania courts by service of process upon its agent there, became indebted to a resident of New Jersey upon a loss by fire occurring in New Jersey. A creditor of the New Jersey creditor, who resided in Massachusetts, sued out of a court of Pennsylvania a writ of foreign attachment against the resident of New Jersey, and served the same upon the agent of complainant in Pennsylvania. Afterwards the resident of New Jersey assigned his claim against complainant to another resident of New Jersey who sued complainant in a New Jersey court of law to recover the amount due from complainant to its creditor in New Jersey, whereupon complainant filed its bill of interpleader in this court, and paid the amount of its debt into court; after which the Massachusetts creditor and the New Jersey assignee interpleaded. The court, in a lengthy and exhaustive review of the authorities, held that the proceeding in the Pennsylvania court gave the Massachusetts creditor a lien upon the debt superior to the right of the assignee. The rule that, in order to give a court jurisdiction in cases of foreign attachment, the *res* must be within the territorial jurisdiction of the court, applies only to tangible chattels capable of actual seizure, and not to choses in action. Jurisdiction to fasten choses in action by garnishee process depends upon the ability to serve process of garnishment upon the debtor of the absent defendant within the territorial jurisdiction of the court. The doctrine advanced by certain judges that, in order to bring the *res* within the jurisdiction, the court may *pro hac vice* treat the *situs* of the debt as following the domicile of the debtor, and not that of the creditor, considered, and doubted; and, semble, that a chose in action, strictly speaking, has no *situs*. A corporation is capable of having several domiciles, and of being sued at the same time in more than one jurisdiction. The contrary doctrine advanced and acted upon by the court in Douglass v. Insurance Co., 33 N. E. Rep. 938, 138 N. Y. 209, was examined and repudiated.

ELECTIONS AND VOTERS—AUSTRALIAN BALLOT LAW—BALLOTS—ARRANGEMENT OF NAMES—CERTIFICATE OF NOMINATION.—A late number of the *American Law Register* calls attention to some late decisions of interest on the subject of the Australian ballot act. The Supreme Court of Wisconsin held, in State v. City of Janesville, 62 N. W. Rep. 933, that as the Australian ballot law only provides for the form of ballots used at elections of officers, the form of ballot prescribed by another statute for use at a special election to determine the amount of a liquor license is not affected by the former act. The Australian ballot law of Pennsylvania (June 10, 1893, P. L. 419, § 14), does not repeal the acts providing a method and a ballot for an election on the question of increasing the debt of a township; the former section applies only to State questions: Evans v. Willistown Township, 3 D. R. 395. But the ballot law of Illinois (June 22, 1891, § 16), which prescribes the form of ballot for an election on the adoption of "a constitutional amendment or other public measure," has been held to repeal all other laws prescribing ballots and modes of voting in questions relating to municipal affairs: County of Union v. Ussery, 147 Ill. 204, 35 N. E. Rep. 618. According to a recent decision of the Supreme Court of Nebraska, in Woods v. McNerney, 63 N. W. Rep. 23, (1) The officer charged with the preparation of the official ballot is given discretion in regard to the arrangement of the names, etc., so far as is not inconsistent with the spirit and purpose of the law, which discretion will not be interfered with by the court; and therefore (2) When the officer, in preparing the ballot, arranged the names of certain candidates, nominated by two parties, on single lines, thus:

FOR LIEUTENANT GOVERNOR.
James N. Gaffin, of Colon. Democrat and People's Independent.

he could not be *mandamused* to arrange them thus:

FOR LIEUTENANT-GOVERNOR.
James N. Gaffin. { People's Independent. / Democrat.

The Supreme Court of Illinois has lately ruled, that under the Australian ballot law of that State (June 22, 1891, P. L. 108), which provides that voting shall be by ballots printed and distributed at public expense, that no other ballots shall be used, and that the voter shall prepare his ballot by making a cross opposite the name of the candidate of his choice, or by writing in the name of the candidate of his choice in a blank space on said ticket, and making a cross opposite thereto, voters are not confined to the names printed on the official ballot, but may write thereon the name of any person for whom they wish to vote, and vote for that person. Sanner v. Patton, 40 N. E. Rep. 290. The same court has also held, that when several independent candidates, nominated by petition, were placed in one column on the official ballot, headed "Citizen's Ticket," a voter, who marked the circle opposite that heading, voted for all the candidates in that column. Murphy v. Battle, 40 N. E. Rep. 470. In a recent case in the Supreme Court of Montana, Stackpole v. Hallahan, 40 Pac. Rep. 80, the person nominated by a political convention as a candidate for the office of county treasurer sent his declination to the central committee, and no certificate of his nomination was ever filed with the county clerk. The committee, being empowered to fill vacancies on the ticket, nominated another candidate. The certificate of this second nomination failed to show the name of the person for whom such candidate was substituted, the cause of the vacancy, that he was nominated to fill a vacancy, or that the central committee had power to fill such vacancy. But as no objection on these grounds was made until after the election, the fairness of which was not questioned, the court held: (1) That the provisions of the Australian ballot law of that State, prescribing the facts to be stated in the certificate of nomination, and the manner in which a nomination may be declined, and the resulting vacancy filled, should not, under such circumstances, be held mandatory; and therefore (2), the election was not invalid, though the statute requires that a candidate declining a nomination shall so notify the officer with whom his certificate of nomination is filed, in writing, and that the certificate of the nomination made to fill the vacancy shall state the cause of the vacancy, * * * the name of the person for whom the new nominee is to be substituted, and the fact that the committee was authorized to fill vacancies. The Supreme Court of Appeals of Virginia has just decided, that the statute of that State adopting the Australian Ballot

System (Act of March 6, 1894), is constitutional, though it contains a provision that the time within which the elector must prepare his ballot shall be limited to two minutes and a half. Pearsons v. Board of Supervisors of Brunswick Co., 21 S. E. Rep. 483. In the same case it was also held that in a provision that a sworn special constable, therein provided for "may" render assistance in preparing the ballot to an elector physically or educationally unable to vote, the word "may" is mandatory.

CONTRACT—CUSTOM—EVIDENCE.—It is decided by the Supreme Court of Montana, in Fitzgerald v. Hanson, 41 Pac. Rep. 230, that where a physician employs another to assist him in a case, evidence is not admissible of a custom prevailing among the physicians of the city and vicinity that, in the absence of a special agreement to the contrary, the assistant is to look to the patient for his pay, it not being shown that it was known to the assistant, or was so general and well established that knowledge and adoption of it might be presumed. The court said:

It is said by Dixon, C. J., in Lamb v. Klaus, 30 Wis. 94, quoting and approving Foye v. Leighton, 2 Fost. (N. H.) 75, that: "A usage explains and ascertains the intent of the parties. It cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties; for it incorporates itself into the terms of the agreement, and becomes a part of it. It must be known and established. It must appear to be so well settled, so uniformly acted upon, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it." The Supreme Court of Maryland uses the following language upon this subject: "The authorities all hold that a usage, to be admissible, must be proved to be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform. Foley v. Mason, 6 Md. 51; Second Nat. Bank of Baltimore v. Western Nat. Bank of Baltimore, 51 Md. 128; Bank v. Grafflin, 31 Md. 520; Patterson v. Crowther, 70 Md. 125, 16 Atl. Rep. 531." Exhibition Co. v. Pickett (Md.), 28 Atl. Rep. 279. In the case of Park v. Insurance Co., 48 Ga. 601, the offer was to prove a certain usage or custom in the life insurance business. The question propounded to witness was: "'Do you know of any usage or custom in the life insurance business as to the commutation of renewals, etc.?' The proper question would have been, 'What is the general or universal usage and custom in the life insurance business as to the commutation of renewals, etc.?' The usage or custom, to be binding, must be a general one, and of universal practice, as applicable to that particular business." The court also said: "The contract of the parties in this case was that the defendants should receive for their services twenty per centum on all sums collected by them for first year's premium insurance, and seven and one-half per centum on all sums received by them for continued renewals of policies. This contract is plain and explicit. There is no doubt or ambiguity as to the meaning of it, or as to the intention of the parties; but it is contended the evidence was admissible to annex an incident to the contract by the proof of usage or custom. But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification that the evidence be not repugnant to or inconsistent with the contract." We find the following in 1 Rice, Ev. p. 278: "Custom and usage are resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and, if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. Barnard v. Kellogg, 10 Wall. 383; Bradley v. Wheeler, 44 N. Y. 495; Wheeler v. New Bould, 16 N. Y. 392; Walls v. Bailey, 49 N. Y. 464. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. Hutton v. Warren, 1 Mees. & W. 466; Wigglesworth v. Dallison, 1 Doug. 201. But the incident sought to be imported into the contract must not be inconsistent with its express terms, or any necessary implication from those terms. Note to Wigglesworth v. Dallison, Smith, Lead. Cas. (6th Am. Ed.) 677, and cases cited. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract. Allen v. Dykers, 3 Hill, 593; Hinton v. Locke, 5 Hill, 437; Magee v. Atkinson, 2 Mees. & W. 442; Adams v. Wordley, 1 Mees. & W. 374, and other cases cited; 1 Smith, Lead. Cas. 680 *et seq.*" "Usage must be uniform. To permit usage to govern and modify the law in relation to dealings of parties, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it. Bank v. Grafflin, 31 Md. 507; Rapp v. Palmer, 3 Watts, 179; Barksdale v. Brown, 1 Nott & McC. 519; Harper v. Pound, 10 Ind. 32; Smith v. Gibbs, 44 N. H. 335; Shackelford v. Railroad Co., 37 Miss. 202. Evidence of particular usage to add to or in any manner affect the construction of a written contract is admitted only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the contract in reference to it. See Kircher v. Venus, 12 Moore, P. C. 361; Meyer v. Dresser, 16 C. B. (N. S.) 646; Appleman v. Fisher, 34 Md. 540; Cotton-Press Co. v. Standard, 44 Mo. 71." We are of the opinion that under the circumstances of this case, where the contract between the parties seems to be plain, and not subject to be misunderstood, the offer of proof of the usage was not sufficient to admit it in testimony. The usage proposed to be proved would set aside what appears to be the contract made between the parties. It does not appear by the offer of proof that the alleged usage was either known to the plaintiff, or that it was "so well settled, so uniformly acted upon, and of so long a continuance as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it." Lamb v. Klaus, 30 Wis. 97. Again using the words in Rice on Evidence, it did not appear that this alleged usage was "uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with refer-

ence to it." It appeared only that the usage prevailed. The usage, as proposed to be proven, falls far short in its nature of such a one as could be considered to be part of such a contract as the one proven and conceded to be the contract in this case. This seems to us to be the only legal conclusion of this case. We are not informed by the record what the ethics and courtesy of the medical profession are in such a matter. If plaintiff has trangressed professional amenities in enforcing this demand as against the defendant, the amount of the judgment and his loss of his brethren's esteem may offset each other.

NEGLIGENCE—DANGEROUS PREMISES—FALL OF BUILDING.—The questions considered by the Supreme Court of Minnesota in Ryder v. Kinsey, 64 N. W. Rep. 94, are of general interest on the subject of the liability of an owner of a building for injury suffered through the falling of a wall. It is there held that the owner of a building is not an insurer against accident from its condition, but so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it, and that where a building falls without any apparent cause, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing that he exercised ordinary care to keep it in a safe condition; but where it appears from such explanatory circumstances that the cause of the fall of the building was a latent defect in its construction, and there is no evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to show that such cause might have been discovered and removed before the accident by the exercise of ordinary care on the part of the owner. Upon the law of the case, the court says:

Upon this evidence, was the question of the defendant's negligence in the premises one of law or fact or for the jury? If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question was one for the jury; otherwise it was for the court. If there is a fair doubt as to the inferences to be so drawn, the question is one of fact. Abbett v. Railway Co., 30 Minn. 482, 16 N. W. Rep. 266. The law applicable to this branch of the case is well settled. While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not by any insecurity or insufficiency for the purpose to which it is put injure any person rightfully in, around, or passing the premises. Nash v. Mill Co., 24 Minn. 501; 2 Shear. & R. Neg. § 702; 1 Wood, Nuis. § 109. Buildings properly constructed do not fall from slight causes, only from some adequate cause. Therefore, where a building falls without apparent cause, in the absence of explanatory circumstances, negligence will be presumed; and the burden is upon the owner of showing that he exercised ordinary care to keep it in a safe condition. Mullen v. St. John, 57 N. Y. 567; 1 Shear. & R. Neg. §§ 59, 60; 2 Thomp. Neg. 1231. In the case under consideration, the evidence as to what was done by the plaintiff and those with him in taking down the small, light sign from the building in question would certainly justify the jury in finding that such act was not an adequate cause for the falling of the wall. The presumption then would be, in the absence of explanatory circumstances, that the wall fell because it was in an unsafe condition, and that the defendant was negligent in not exercising ordinary care in properly inspecting and keeping it in repair. But it is only in the absence of explanatory circumstances as to the cause of the fall of a building that the presumption of negligence on the part of the owner is presumed *prima facie*. Therefore, where such explanatory circumstances are given in evidence, and the cause of the fall of the building is established, and there is nothing in the evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to give evidence tending to show that such cause might have been discovered and removed by the exercise of ordinary care on the part of the owner. The cause of the fall of the wall is clearly established in this case. It fell because of a defect in its construction, in that it was not supported in the usual manner. This was readily discovered after the accident, when the bricks were on the sidewalk, and the manner of constructing the wall was exposed. It is easy to be wise after the fact, but the question is, did the defendant know, or might he have known, by the exercise of ordinary care, before the accident, of the defect in the construction? If so, he would have been clearly negligent in the premises. But he did not build the wall, and there is no evidence in the case that there was anything in the external appearance of the building indicating its defective construction. On the contrary, it affirmatively appears by the uncontradicted evidence that the defect in the construction was a concealed one. Neither is there any evidence in the case tending to show that the defect could have been discovered by the exercise of ordinary care in inspecting the building. The *prima facie* presumption arising from the undisputed facts is that the defect could not have been discovered by the exercise of such care; for the sheeting on the inside of the studding and the brick wall on the outside of them concealed the defect, and the absence of sheeting next to the brick wall and the anchoring of it to the sheeting by the large nails could not have been discovered, by any means disclosed by the evidence, except by the exercise of extraordinary care in inspecting the building, by making openings in the sheeting or wall to discover whether or not the wall was properly supported. Ordinary, not extraordinary, care, was the measure of the defendant's duty in the premises. No importance can be attached to the fact that the large sign was fastened to the brick wall, for, assuming that the wall was properly constructed, it could not be negligence to fasten the sign to it, and there was nothing about the sign or the manner in which it was attached to the wall to indicate the latent defect in the wall. Upon the whole record, we are satisfied that the presumption of negligence arising from the mere fact

that the wall fell was rebutted by the explanatory circumstances disclosed by the evidence, showing the cause of its fall, and that the defect was a latent one; and that, in the absence of any evidence disclosing any fact or circumstance from which it might be reasonably inferred that such defect could have been discovered by the exercise of ordinary care on the part of the defendant, the question of his negligence is not one admitting of a fair doubt, and that the jury were correctly instructed to return a verdict for him. Any other rule would practically make owners of buildings insurers of their safety.

MUNICIPAL CORPORATION — ERECTION OF WATER DAM.—In City of Centralia v. Wright, 41 N. E. Rep. 217, decided by the Supreme Court of Illinois, it was held that where a city which is authorized by law to establish a system of waterworks and to maintain the same indefinitely, erects a dam for the purpose of procuring a water supply, a property owner, who is injured by the erection of such dam, may recover damages both past and prospective. The court said in part:

But to recur to the question in dispute—whether the recovery shall be confined to such damages as had been sustained at the time the action was brought, or shall a recovery be had for all past, present and future damages? The solution of this question, as we understand the law, depends upon another question, and that it is whether the injury is permanent in its nature, or merely of a temporary character. If the former, all damages may be recovered; if the latter, only such damages as had accrued up to the time the action was brought. Thus, in Railroad Co. v. Maher, 91 Ill. 312, where an action was brought to recover damages to a lot alleged to have been sustained by the erection of a pier for a bridge, it was held, where an injury to real estate is permanent in its nature, and not of a temporary character, the owner may recover, not only for the present, but also for future damages, and such a recovery will be a bar to any other action for damages growing out of the continuance of the cause of the injury. In Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. Rep. 693, where a similar question arose, it was held: If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law will not regard it as permanent, no matter with what intention it was built, and damages can therefore be recovered only to the date of the action. But in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character, damages may be allowed for the whole injury, past and prospective. So in Railroad Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460, it was held: "In an action brought for a deterioration in value of real estate occasioned by a nuisance of a permanent character, or which is treated as permanent by the parties, all damages for the past and future injury of the property may be recovered, and one recovery in such case is a bar to all future actions for the same cause." In Railroad Co. v. McAuley, 121 Ill. 160, 11 N. E. Rep. 67, a similar question arose, and it was there held: "In case of an injury arising from a nuisance, where the original nuisance to land is of a permanent character, a recovery must be had for the entire damages in one action; but where the nuisance is transient, rather than permanent, the continuance of the injurious acts is regarded as a new nuisance, for which a fresh action will lie." There are many other cases where the same doctrine has been laid down, but the law on this subject is so well settled that a reference to other cases is not deemed necessary.

Here the city of Centralia procured the plant where it could establish a system of water-works to supply the inhabitants of the city and the railroad company with water, not for a day, a week, or a year, but continuously. A dam was constructed, which seemed to be of a permanent character. Pipes were laid and other improvements made, which all seemed to be of a permanent character. It is true the plant was leased, as is provided in the lease, only for twenty years, but that is unimportant. It may be renewed, as its terms indicate the parties intend shall be done; but, if it is not renewed, it is apparent from the lease itself that the water-works plant will remain and be continued after the lease expires, as a permanent "plant.'" The lease provides: "(10) Should the parties hereto elect not to renew this contract at the expiration of said term, then the said party of the first part shall purchase the permanent improvements, other than machinery, etc., which it is herein provided that said party of the second part shall have a right to remove, provided, however, that such permanent improvements shall be of a kind and quality as are reasonably fit and suitable for such a system of water-works as the party of the first part may require at that time; and, if said parties shall be unable to agree upon the value thereof, then said parties shall each select an appraiser, who shall determine amount," etc. Whether the lease is renewed or not, it is apparent that the dam which caused the injury, and the water-works plant, will continue as a permanent structure. But, aside from these considerations, it is not necessary to establish the fact that the structure erected by the city shall continue forever in order to determine that the structure is permanent. It is enough that the city had the legal right to erect and maintain the system of water-works perpetually. When the lease expires it is not bound to surrender the plant to the railroad company; but it may condemn the lands, and thus acquire the absolute title, and continue for all time, if it so desires. What was said in Railroad Co. v. Horan, 131 Ill. 30, 23 N. E. Rep. 621, applies here. In the discussion of what structures may be regarded as permanent, it is said: "It cannot be doubted that the road-bed, embankments, bridges, culverts, and other appurtenances of a railroad constructed and maintained in pursuance of lawful authority are to be regarded in law as permanent structures. This is not so because it is certain that they will in fact continue to subsist in their present condition forever, or that they are not liable to be changed in many respects by the proprietors of the railroad company whenever they see fit, or by natural causes, but it is so because the railroad company has a legal right to maintain them perpetually." Here the city of Centralia was authorized by law to establish and maintain a system of water-works, and has the power to continue them perpetually. We think, therefore, the erection of the dam which caused the damages was a permanent structure; and the circuit and appellate courts properly held that damages, past, present and prospective, were recoverable.

CARRIERS OF PASSENGERS — FAILURE TO WAKE PASSENGER.—In Missouri, etc. R. Co. v. Kendrick, 32 S. W. Rep. 42, decided by

the Court of Civil Appeals of Texas, it was held that a railway company is not liable for failure of a conductor to awaken a passenger at a station, where she was to change cars, though he had promised to do so. The following is from the opinion of the court:

As a rule, it has been held by our courts that it is the duty of railway companies to establish needful and proper rules and regulations for announcing the stations along their lines of railway; and, on the other hand, that it is the duty of passengers to be ready to disembark with reasonable dispatch, so as not to delay the movement of trains, or unnecessarily impede travel or commerce. Mr. Hutchinson, in his work on Carriers (section 617b), thus lays down the doctrine: "Awaking Sleeping Passengers. So it is said that it is ordinarily no part of the carrier's duty to see that passengers are awake when the train reaches their destinations, and that the company is not bound by the conductor's promise to so awaken a passenger. Exceptional circumstances might, however, impose the duty. But in the case of sleeping cars the rule is different. There the passenger is invited to go to sleep, and pays extra for the conveniences therefor, and, as will be seen, it is the duty of the company's servants to awaken him in time to dress and alight in safety." In support of this proposition, Mr. Hutchinson cites the cases of Sevier v. Railroad Co., 61 Miss. 8, and Nunn v. Railroad Co., 71 Ga. 710. We have not access to the last-named case. In the case of Sevier v. Railroad Co., *supra*, the conductor had promised to awaken a passenger at Jackson, which he failed to do, but put him off four miles beyond. The court said: "It was not the duty of the conductor to arouse the appellant on the arrival of the train at Jackson by any special means applicable to his condition as being sick and drowsy. The business of the conductor was to manage the train according to the established regulations, and not to vary them for an individual. Regulations are made for the traveling public, and should be reasonable as adapted to the convenience of the public. If persons sick or under any disability which renders them unable to conform to the reasonable regulations for the community generally are inconvenienced by this inability, they have no legal cause of complaint against a carrier who undertakes to carry the public generally, according to a plan adopted to suit persons generally in a condition to travel, and not designed to meet the wants of those not in such condition. The obligation of the carrier was to carry the appellant safely to Jackson, and on arrival there to announce the fact, and afford an opportunity for him to leave the car. That he was asleep, and that his sleep was induced by sickness, did not entitle him to special attention. · · · The agreement of the conductor to arouse the appellant at Jackson did not impose any obligation on the railroad company. The appellant was bound to know that the conductor had no authority to incur an obligation to that effect for the company, and that his duty was to the passengers generally, and not to him particularly. He must be held to have known the established usage of calling out the name of the station, and for the passengers to leave the car on its arrival at his destination, and that the promise of the conductor was his personal obligation, and was not the promise of the company, which he had no right to bind by an undertaking in behalf of one of many passengers to all of whom, respectively, the company owed the same duties. Whether sudden illness occurring to one on board a train after going upon it, and made known to the conductor, would create such an emergency as to impose the duty on him to give such passenger needed attention, and vary the course of dealing with passengers, is purposely left an open question, to be decided when it arises." See, also, Railroad Co. v. Kendrick, 40 Miss. 386; Redf. R. R. 330. This is in harmony with the rule heretofore announced by this court and supported by an unbroken line of decisions in this State. Railway Co. v. Alexander (Tex. Civ. App.), 30 S. W. Rep. 1113, and authorities there cited; Railway Co. v. James, 82 Tex. 306, 18 S. W. Rep. 589; Railway Co. v. Perry (Tex. Civ. App.), 27 S. W. Rep. 496. In this case, although there is a conflict in the evidence as to whether the conductor actually agreed to awake Mrs. Kendrick at Whitesboro, and whether she was actually asleep when the train arrived at that place, it is not controverted that the usual announcement of the station was made by appellant's servants when the train reached Whitesboro, and that the train remained there long enough for passengers to disembark, and that, after Mrs. Kendrick and her children were found on the train after it had passed Whitesboro several miles, they were put off at the next station, and given a return check to Whitesboro, free of charge. Under such circumstances, it certainly cannot be said that the company was liable for the failure of the conductor to awaken the lady at Whitesboro.

THE ORIGIN AND USES OF THE COMMON SEAL.

Sealing is one of the most ancient customs which have been handed down as hereditaments to modern civilization. We read of it first among the Jews and Persians in the earliest and most sacred records of history;[1] and from this ancient law, an instrument under seal has derived a dignity superior to any private writing. And, in conclusiveness, it occupies a middle ground between the simple contract and a judicial record.[2] Affixing a seal expressed an intention to be bound by it, derived from the times when few people could sign their own names.[3] It was an evidence of truth[4] among the Saxons, expressed by affixing to the instrument the sign of the cross; and so, whether the party could write or not, which custom is still kept up by the the illiterate of the present day.[5] At the conquest the Norman lords introduced into England some of their own fashions and among them the waxen seals. So conclusive was this seal, that for a long time sealing without signing was sufficient to authenticate

[1] 1 Kings ch. 21; Daniel, ch. 6; Esther, ch. 8.

[2] Bishop on Con. § 139.

[3] Will. on Real. Prop. 147; Rapalje & Lawrence Law Dict., "Seal."

[4] 2 Black. 305.

[5] 2 Black. 305.

a deed.[6] But it has since been decided that a wafer is as good, or any other tenacious material on which an impression is made,[7] and by still better authority, merely embossing it on the paper itself.[8] But by modern legislation or decisions, a scroll or the word seal written or printed, if employed as a seal, is adequate.[9] Owing to the ancient origin of the use of the seal, and also the fact that by the common law a sealed instrument could not be assigned or transferred, it has been held, and is now the law, in the absence of contrary legislation, that bills of exchange[10] and promissory notes[11] must be "open letters," that is, unsealed. If a note or a bill is executed by two or more persons, some with and others without seals, it will be treated as a sealed instrument, or specialty contract, as to those who signed with seals.[12] But the mere attaching to the signature the word "seal," no reference being made to it in the body of the instrument, does not constitute it a sealed instrument.[13] A bill or note under seal, not being commercial paper in the legal sense of the term, is not exempted in the hands of a transferee, though he may have acquired it before maturity, without notice, from defenses of the maker against the payee, growing out of the original contract.[14] Affixing a seal has the effect of changing the character of an instrument from a parol agreement to a specialty. One member of a firm, is the agent of that firm, authorized to do certain things. He cannot validly execute for all an instrument—not within the ordinary course of dealings—under seal, except pursuant to sealed authorization.[15]

At common law, a corporation could act only under its corporate seal, but this notion has long since dropped from the law.[16] But by recent decisions a corporation need only use its seal, when it would be necessary for an individual to use one.[17] An agent of a corporation may be validly appointed without the use of corporate seal,[18] although for the purpose of mortgaging or conveying real estate of the corporation.[19] A corporation may adopt any seal it chooses,[20] though it be the individual seals of its officers.[21] And when the seal is affixed to a contract, it is *prima facie* evidence that it was entered into by the corporation;[22] but to render the instrument to which the corporate seal is affixed a corporate act, it must be affixed by an officer of the corporation, or an agent, duly authorized.[23] At common law, a release of a right of action for a breach of contract, whether under seal or not, was required to be under seal.[24] And as a general rule, a sealed instrument cannot be varied or abrogated by another agreement unless the latter is also sealed.[25] A release under seal cannot be varied, at law, by evidence of a parol agreement between the parties at the time of the execution.[26] A release under seal operates as an estoppel against

[6] Wright v. Wakeford, 17 Ves. Jr. 458 9.

[7] Richards v. Boller, 6 Daly, 460; Hendrix v. Boggs, 15 Neb. 469; Gillespie v. Brooks, 2 Redf. 349; Tasker v. Bartlett, 5 Cush. 359; Warren v. Lynch, 5 Johns. 239; Beardsley v. Knight, 4 Vt. 471.

[8] Pierce v. McIndseth, 106 U. S. 546, 549; *contra*, Coit v. Millican, 1 Denio, 376; Bank of Rochester v. Gray, 2 Hill. N. Y. 227.

[9] Bishop on Con. § 111; and citations.

[10] Conine v. Junction & B. R. Co., 3 Houst. 289; Story on Bills, § 62; Edwards on Bills, 208; Laidley v. Bright, 17 W. Va. 779; Frevall v. Fitch, 5 Whart. 325; Clegg v. Lemessurier, 15 Gratt. 108; Rawson v. Davidson, 49 Mich. 607; McCarley v. Supervisors, 58 Miss. 483.

[11] Warren v. Lynch, 5 Johns. 239; Clark v. Farmer's Mfg. Co., 15 Wend. 256; Hopkins v. R. R. Co., 3 Watts & S. 410; Clegg v. Lemessurier, 15 Gratt. 108; Mann v. Sutton, 4 Rand. 253; Park v. Duke, 2 McCord, 380; Helper v. Alden, 3 Minn. 332; Muse v. Dantzler, 85 Ala. 359.

[12] Rankin v. Roller, 8 Gratt. 63.

[13] Peaseley v. Boatwright, 2 Leigh, 196; Cromwell v. Tate, 7 Leigh, 305; Anderson v. Bullock, 4 Munf. 442; Blackwell v. Hamilton, 47 Ala. 472; Carter v. Penn, 4 Ala. 140; Moores Admr. v. Lesseur, 18 Ala. 606.

[14] Merritt v. Cole, 7 Hun, 98; Sayre v. Lucas, 2 Stew. 259; Muse v. Dantzler, 85 Ala. 362.

[15] Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485; Schuyler v. Bailey, 40 Mo. 69; Gage v. Gage, 10 Fost. N. H. 420; Blood v. Goodrich, 9 Wend. 68; Banogree v. Hovey, 5 Mass. 11; Worrall v. Munn, 1 Selden, 229; Smith v. Dickinson, 6 Humph. 261; Elliott v. Stocks, 67 Ala. 336.

[16] Bank of Columbia v. Patterson, 7 Cranch. 299; Bank of U. S. v. Danridge, 12 Wheat. 64; Savings Bank v. Davis, 8 Conn. 191.

[17] Crawford v. Longstreet, 43 N. J. L. 325.

[18] Randall v. Van Vechten, 19 Johns. 60; Reynolds v. Collins, 78 Ala. 94; Angell & Ames on Corp., § 288.

[19] Despatch Line v. Bellamy M'f'g. Co., 12 N. H. 205; Cook v. Kuhn, 1 Neb. 472; Leinkauff v. Coleman, N. Y. 1888.

[20] Perry v. Prince, 1 Mo. 664, 14 Am. Dec. 316.

[21] Taylor v. Heggie, 83 N. C. 244.

[22] Berks Road Co. v. Myers, 6 Serg. & R. 12; Musser v. Johnson, 42 Mo. 74, 6 Paige (N. Y.) 54.

[23] Koehler v. Black River Co., 2 Black. 715; Jackson v. Campbell, 5 Wend. 572; Bank of Ireland v. Evans, 5 H. L. Cas. 389, 32 Eng. Law & Eq. 23.

[24] Leake on Con., 922.

[25] Pratt v. Morrow, 45 Mo. 404, 100 Am. Dec. 381.

[26] Ryan v. Wood, 48 N. Y. 204; Buswell v. Pioneer, 35 How. Pr. 450, 37 N. Y. 314; Allen v. Cowan, 28 Barb. 108.

the party executing it.[27] And since a seal imports a consideration, if a creditor releases under seal his debtor, or even one of several joint debtors, without actual payment, it will bar a suit for the debt.[28] The above is the rule where not changed by legislation.

W. M. VAUGHAN.

[27] Rountree v. Jacob, 2 Taunt. 181; Harding v. Ambler, 2 Mees. & W. 279.

[28] Bender v. Sampson, 11 Mass. 42, 44, 45; Valentine v. Foster, 1 Met. 520; Walker v. McCullough, 4 Green. 421; Willing v. Peters, 12 S. & R. 177; McClary v. Reznor, 3 Del. Ch. 445.

INSURANCE AGENT — AUTHORITY—RATIFICATION OF ACTS.

TERRY V. PROVIDENT FUND SOC. OF NEW YORK.

Appellate Court of Indiana, June 12, 1895.

1. The acceptance by the insurer of an application forwarded through a person assuming to act as its agent, the applicant being ignorant of his want of authority, is a ratification of the acts of such agent in soliciting and contracting for the insurance within the scope of his apparent authority.

2. Where insured pays the agent of an insurance company soliciting the insurance, on delivery of the policy, a portion of the premium, credit being given the insured by the agent for the balance, which constitute the commissions the agent is entitled to, the insurer is bound by the payment, though the policy provide that it shall not take effect until the money is paid at the home office of the insurer, and that no waiver of the provisions of the policy shall be claimed by reason of acts of any person unless such acts are specially authorized in writing over the signature of the president of insurer, and though the insurer cancel the policy for non-payment of the premium before the loss, failing, however, to notify insured of such cancellation until after the loss

REINHARD, C. J.: This is a suit on an accident insurance policy. The cause was tried by the court. Special findings were made by the court, with its conclusions of law thereon. The appellant excepted to the conclusions of law, and unsuccessfully moved for judgment on the findings. The court rendered judgment for appellee. The appellant's assignments of error are: "(1) The court erred in its conclusions of law on the special findings of fact. (2) The court erred in overruling appellant's motion for judgment on the special findings of fact."

These alleged errors may be considered together. The policy contains the following provision: "This insurance shall not take effect until the first advanced quarterly premium call shall be paid at the home office in New York, for which a receipt shall be given over the name of the president, showing the date and hour of payment;" also the following: "No waiver shall be claimed by reason of the acts of any person, unless such acts shall be specially authorized in writing over the signature of the president of the society." It is not claimed that the first quarterly premium (which amounted to five dollars) was paid at the home office in New York. The appellee's contention is that the same was never paid to the company or any authorized agent of the same. The appellant contends that he paid one-half the premium to the agent who procured the insurance to be written, and that as to the other half, which was said agent's commission, the agent gave the appellant credit for the same. The facts found specially show that about December 10, 1893, one R. H. Carpenter, who lived near Huron, in Lawrence county, solicited the appellant to take a policy of accident insurance in the appellee's company. Carpenter, who had previously solicited appellant in that behalf, had in his possession one of said company's blank applications, which he filled out and got appellant to sign. He forwarded the application to one E. F. Sutherland, at Mitchell, Ind., and he to Dornam N. Davidson, the appellee's general agent for the State of Indiana, at Indianapolis, who, in turn, forwarded the same to the appellee's home office in New York City, where it was duly received, and marked "Accepted," and a policy issued thereon on the 18th day of December, 1893. At the same time a receipt for the first premium call of five dollars was signed by the president of the company, which, together with the policy, was transmitted by mail to said Davidson, with instructions to deliver the policy and receipt to the applicant on the receipt of the five dollars. Sutherland was not a commissioned agent of the company, but had some of its blank applications, and used them for persons desiring insurance in appellee's company. When filled out and signed, he sent such applications to Davidson, who forwarded them to the home office. Carpenter was unknown to the company or the State agent. When it was ascertained that Carpenter had taken the application, the words "R. H. Carpenter" were written on the margin thereof, but only as a memorandum to designate the person who had taken the application. At the time Sutherland sent the application to Davidson, he requested the latter to send him (Sutherland) the policy, and hold the receipt for the money until he (Sutherland) and sent the same to Davidson.

In accordance with this request, Davidson sent the policy to Sutherland, who handed or sent the same to Carpenter. About January 1, 1894, Carpenter delivered the policy to the appellant, who paid Carpenter $2.50 in cash, and the latter gave appellant credit for $2.50 additional, saying that it was his commission for securing the policy, which was true. Carpenter at the same time also delivered to the appellant a blank of said company for making proof of loss in case of accident. On the 8th day of January, 1894, appellant was injured, and in consequence thereof was disabled for a period of 16 weeks, for which, if properly insured, he would have been entitled to receive

indemnity from the company, at the rate of $10 per week. Carpenter resided six miles from Huron, where the appellant lived, and the latter had known Carpenter for 15 years. Appellant, when he made the application, was able to read; and, on the night of the day upon which he received the policy, he read all its conditions and provisions, including the ones hereinbefore alluded to, and the further one that "the provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance of this certificate and to its validity and enforcement, and no waiver shall be claimed," etc., as heretofore stated. The court further finds that "the said plaintiff trusted entirely to Carpenter;" that Davidson held said receipt at Indianapolis, waiting for the money to pay the said first premium, until about December 31, 1893, and, not having received the same, returned the receipt to the home office, with advice that the said premium had not been paid, when, on January 3, 1894, the policy was canceled by the company, and the word "Canceled" stamped on said application. The company or its agents never notified appellant of the cancellation of the policy until after notice of said injury. On January 16, 1894, the State agent, Davidson, was informed by Sutherland that Carpenter had paid him $2.50 on and for the appellant's advance premium, and asked instructions as to what should be done with the money, and was informed by Davidson that the policy had been forfeited for non-payment of the advance premium January 3, 1894, who instructed him to return the money to appellant or Carpenter; and it was so tendered by Sutherland, but refused, and Sutherland still holds the money subject to the orders of the appellant or Carpenter. On the 8th day of January, 1894, appellant made proof of his injury on the blank given him by Carpenter; and appellant forwarded said proof to the home office of the appellee, where it was duly received on January 12, 1894; and the company notified appellant, denying any liability, and informing him of the cancellation of the policy. Appellant, after reading the policy, never went to see Carpenter to learn why he had not given him a receipt for the money paid him, signed by the president of the company, showing the amount, date, and hour or payment, nor did he ever demand such a receipt, nor inquire whether Carpenter had the same, or had any written authority from the company to transact its business. If there was any limitation on Carpenter's authority to act as agent, appellant had no knowledge of the same, except as the same was disclosed by the policy. When it received notice of the injury, the company denied all liability under the policy and for said injury, and has denied all liability ever since. The policy had, among other indorsements upon it, the following:

"$5.00. Dec. 18, 1893. Received of E. A. Terry five dollars of first advance quarterly annual premium call on policy No. 6,082, this Dec. 18, 1893. A. N. Lockwood, President.

"This receipt is void unless dated on the day of actual payment, and at that time countersigned by D. N. Davidson."

The following indorsement was across the face of the policy: "Payment having been made after the date of expiration of assessment, no indemnity will be allowed for injuries received between the date of expiration and time of payment;" also the following indorsement across the face, in blue pencil: "Canceled. D. N. Davidson. 12-18 93. 1-3 94." The application is stamped across its face "Canceled," and beneath this word is written in red ink: "January 3, 1894, non-payment advance premium call;" also the following, in red ink: "Accident department. Application accepted at 5 P. M., this 18th day of December, 1893. Secy."

We think under the facts found, it must be conceded that Carpenter had authority to deliver the policy upon condition of the prepayment of the advance premium according to the terms of the policy. This is true, as we conceive, from the fact that the execution of the policy is not denied under oath, and that the risk was accepted by the company upon the appellant's application. The failure to deny the execution of the policy and the acceptance of the application amount to a ratification of the acts of the agent in soliciting the insurance, the receiving of the application, and the conditional delivery of the policy. Insurance Co. v. Gilman, 112 Ind. 7, 13 N. E. Rep. 118; Kerlin v. Association, 8 Ind. App. 628, 35 N. E. Rep. 39, and 36 N. E. Rep. 156.

The only reason urged for the cancellation of the policy was the failure of the applicant to send the advance premium to the home office; for it cannot be denied, we think, that if the appellant had sent the money to the home office or paid it to Davidson, or the company's recognized agent, Sutherland, the delivery of the policy through Carpenter could not be successfully disputed. The company could, of course, have repudiated the acts of Carpenter entirely, and refused to recognize his authority as its agent to contract for the insurance. But it cannot be heard to ratify the acts of Carpenter in part and repudiate them in part. When it recognized the regularity of the application and the legitimacy of the channel through which it came, it placed Carpenter upon the same foundation with other agents of the company for soliciting and contracting for insurance. He had just as much authority in that behalf as a regularly commissioned agent would have had. Had such commissioned agent been sent by the appellee to the appellant to solicit this insurance, without instructions except to comply with the terms of the application and policy, there would be just as much reason for disputing his authority to deliver the policy except upon payment of the premium as there was here on the part of Carpenter. But the authorities above cited firmly establish the rule, we

think, that where the applicant is igorant of any limitation upon the agent's authority, as it is found was the case here, and the applicant acts in good faith, and relies upon the acts and statements of the agent, within the scope of his apparent authority, the principal will be bound by the agent's statements and acts; and this, we think, includes a waiver of the condition that the advance premium must be paid at the home office, and a receipt procured for the same. In the case of Kerlin v. Association, *supra*, it was said by Davis, J., speaking for this court: "So if, at the time the application is made or the insurance is contracted, circumstances or conditions exist which are in conflict with the terms and conditions of the application or policy, and the agent of the company knew of this existence, 'and agreed that as to them the conditions' of the application should not be effective, the insurer cannot take advantage of their existence to defeat a recovery after loss has occurred." In the present case, of course, the company is not subject to the criticism of having waited till the injury had occurred before asserting its defense. It canceled the policy before such injury, because it had not received the premium. But if the premium was paid to its agent, as we must hold that it was, it is in effect the same as if it had been paid at the home office, and the fact that the money was not accounted for by the agent before the injury cannot be made a cause for forfeiting the policy. It seems to us that the question before us is narrowed to the inquiry whether the insured shall be made to suffer for the misconduct of the company's agent.

Under the circumstances, we think the appellee is estopped to deny the payment of the premium to the home office, the agent Carpenter having waived the same, and accepted it in cash, less his commission, which he had a right to remit. To quote again from the case of Kerlin v. Association, *supra*: "In our opinion, * * * the agent of the company had the right, on the occasion in question, to do all that could have been done in relation to such matter by the officers of company at the home office." Indeed, the conduct of the secretary or other officers at the home office was such as to lead to the conclusion that it was not the intention that the money should be paid at the home office. The receipt for the advance premium was sent with the policy to the general agent at Indianapolis. But whether such was the intention or not is immaterial if the requirement to pay at the home office was waived. As said by Mitchell, J., in Insurance Co. v. Gilman, *supra*: "It is well settled that payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, notwithstanding a stipulation in the policy to the contrary; and, unless a policy so delivered is avoided by showing bad faith or collusion, it is enforceable. * * * If the company has been credited with the premium in account by its agent, or if credit has been extended by the agent to the assured, or if it has, in fact, been paid to him, no doubt it is a sufficient payment to the company to support the policy." In May on Insurance (section 360) it is said: "If the agent be authorized to receive the premium, an agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent." See, also, Behler v. Insurance Co., 68 Ind. 347; 11 Am. & Eng. Enc. Law, 308, 336; Insurance Co. v. Jenks, 5 Ind. 96. Moreover, in the case in hand the appellee must have known that the application was taken by Carpenter, as the words "Credit R. H. Carpenter" were written on the back of the application after it had passed from appellant's possession, and without his knowledge. Whatever knowledge this implied was possessed by the appellee when it received the application and indorsed it as accepted. Even if Carpenter was but a broker, he was still authorized to deliver the policy and receive the premium. Insurance Co. v. Hartwell, 123 Ind. 177, 24 N. E. Rep. 100; Criswell v. Riley, 5 Ind. App. 496, 30 N. E. Rep. 1101, and 32 N. E. Rep. 814. There is no contention that $2.50 was not the correct amount coming to the appellee after deducting the commission. In fact, as already intimated, the only complaint appears to be that Carpenter did not promptly turn over the money to the company. If, however, he was its agent for the purpose of delivering the policy and collecting the premium, as we think we have demonstrated he was, then the appellee is bound by the payment made to him, and the policy was in force when the appellant was injured. We, therefore, think the court erred in its conclusions of law, and in not rendering judgment in favor of the appellant. Judgment reversed, with instructions to the trial court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of appellant for $160 and interest from the 9th day of February, 1894.

NOTE.—*Insurance, Payment of Premium.*—It is usual, if not universal, for policies of insurance, when executed and delivered, to recite the payment of the premium therefor. And, in the ordinary course of business, the premium is paid to the agent who delivers the policy, whether he be a general, local recording, or soliciting agent. And the general rule is that payment of the premium to such agent when the policy is delivered by him is binding in the fullest sense on the company. If the agent have authority to collect the premium and deliver the policy to the assured, or if these duties be within the real or apparent scope of the authority of the agent, and the policy recites the payment of the premium, the same will be deemed in law to be paid, even though the cash may not be actually passed between the assured and the collecting agent, but an arrangement is agreed upon between them in satisfaction of the premium which results in the agent of the company crediting it with the amount of the premium in the usual

indemnity from the company, at the rate of $10 per week. Carpenter resided six miles from Huron, where the appellant lived, and the latter had known Carpenter for 15 years. Appellant, when he made the application, was able to read; and, on the night of the day upon which he received the policy, he read all its conditions and provisions, including the ones hereinbefore alluded to, and the further one that "the provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance of this certificate and to its validity and enforcement, and no waiver shall be claimed," etc., as heretofore stated. The court further finds that "the said plaintiff trusted entirely to Carpenter;" that Davidson held said receipt at Indianapolis, waiting for the money to pay the said first premium, until about December 31, 1893, and, not having received the same, returned the receipt to the home office, with advice that the said premium had not been paid, when, on January 3, 1894, the policy was canceled by the company, and the word "Canceled" stamped on said application. The company or its agents never notified appellant of the cancellation of the policy until after notice of said injury. On January 16, 1894, the State agent, Davidson, was informed by Sutherland that Carpenter had paid him $2.50 on and for the appellant's advance premium, and asked instructions as to what should be done with the money, and was informed by Davidson that the policy had been forfeited for non-payment of the advance premium January 3, 1894, who instructed him to return the money to appellant or Carpenter; and it was so tendered by Sutherland, but refused, and Sutherland still holds the money subject to the orders of the appellant or Carpenter. On the 8th day of January, 1894, appellant made proof of his injury on the blank given him by Carpenter; and appellant forwarded said proof to the home office of the appellee, where it was duly received on January 12, 1894; and the company notified appellant, denying any liability, and informing him of the cancellation of the policy. Appellant, after reading the policy, never went to see Carpenter to learn why he had not given him a receipt for the money paid him, signed by the president of the company, showing the amount, date, and hour or payment, nor did he ever demand such a receipt, nor inquire whether Carpenter had the same, or had any written authority from the company to transact its business. If there was any limitation on Carpenter's authority to act as agent, appellant had no knowledge of the same, except as the same was disclosed by the policy. When it received notice of the injury, the company denied all liability under the policy and for said injury, and has denied all liability ever since. The policy had, among other indorsements upon it, the following:

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The following indorsement was across the face of the policy: "Payment having been made after the date of expiration of assessment, no indemnity will be allowed for injuries received between the date of expiration and time of payment;" also the following indorsement across the face, in blue pencil: "Canceled. D. N. Davidson. 12-18 93. 1-3 94." The application is stamped across its face "Canceled," and beneath this word is written in red ink: "January 3, 1894, non-payment advance premium call;" also the following, in red ink: "Accident department. Application accepted at 5 P. M., this 18th day of December, 1893. Secy."

We think under the facts found, it must be conceded that Carpenter had authority to deliver the policy upon condition of the prepayment of the advance premium according to the terms of the policy. This is true, as we conceive, from the fact that the execution of the policy is not denied under oath, and that the risk was accepted by the company upon the appellant's application. The failure to deny the execution of the policy and the acceptance of the application amount to a ratification of the acts of the agent in soliciting the insurance, the receiving of the application, and the conditional delivery of the policy. Insurance Co. v. Gilman, 112 Ind. 7, 13 N. E. Rep. 118; Kerlin v. Association, 8 Ind. App. 628, 35 N. E. Rep. 39, and 36 N. E. Rep. 156.

The only reason urged for the cancellation of the policy was the failure of the applicant to send the advance premium to the home office; for it cannot be denied, we think, that if the appellant had sent the money to the home office or paid it to Davidson, or the company's recognized agent, Sutherland, the delivery of the policy through Carpenter could not be successfully disputed. The company could, of course, have repudiated the acts of Carpenter entirely, and refused to recognize his authority as its agent to contract for the insurance. But it cannot be heard to ratify the acts of Carpenter in part and repudiate them in part. When it recognized the regularity of the application and the legitimacy of the channel through which it came, it placed Carpenter upon the same foundation with other agents of the company for soliciting and contracting for insurance. He had just as much authority in that behalf as a regularly commissioned agent would have had. Had such commissioned agent been sent by the appellee to the appellant to solicit this insurance, without instructions except to comply with the terms of the application and policy, there would be just as much reason for disputing his authority to deliver the policy except upon payment of the premium as there was here on the part of Carpenter. But the authorities above cited firmly establish the rule, we

think, that where the applicant is igorant of any limitation upon the agent's authority, as it is found was the case here, and the applicant acts in good faith, and relies upon the acts and statements of the agent, within the scope of his apparent authority, the principal will be bound by the agent's statements and acts; and this, we think, includes a waiver of the condition that the advance premium must be paid at the home office, and a receipt procured for the same. In the case of Kerlin v. Association, *supra*, it was said by Davis, J., speaking for this court: "So if, at the time the application is made or the insurance is contracted, circumstances or conditions exist which are in conflict with the terms and conditions of the application or policy, and the agent of the company knew of this existence, 'and agreed that as to them the conditions' of the application should not be effective, the insurer cannot take advantage of their existence to defeat a recovery after loss has occurred." In the present case, of course, the company is not subject to the criticism of having waited till the injury had occurred before asserting its defense. It canceled the policy before such injury, because it had not received the premium. But if the premium was paid to its agent, as we must hold that it was, it is in effect the same as if it had been paid at the home office, and the fact that the money was not accounted for by the agent before the injury cannot be made a cause for forfeiting the policy. It seems to us that the question before us is narrowed to the inquiry whether the insured shall be made to suffer for the misconduct of the company's agent.

Under the circumstances, we think the appellee is estopped to deny the payment of the premium to the home office, the agent Carpenter having waived the same, and accepted it in cash, less his commission, which he had a right to remit. To quote again from the case of Kerlin v. Association, *supra:* "In our opinion, * * * the agent of the company had the right, on the occasion in question, to do all that could have been done in relation to such matter by the officers of company at the home office." Indeed, the conduct of the secretary or other officers at the home office was such as to lead to the conclusion that it was not the intention that the money should be paid at the home office. The receipt for the advance premium was sent with the policy to the general agent at Indianapolis. But whether such was the intention or not is immaterial if the requirement to pay at the home office was waived. As said by Mitchell, J., in Insurance Co. v. Gilman, *supra:* "It is well settled that payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, notwithstanding a stipulation in the policy to the contrary; and, unless a policy so delivered is avoided by showing bad faith or collusion, it is enforceable. * * * If the company has been credited with the premium in account by its agent, or if credit has been extended by the agent to the assured, or if it has, in fact, been paid to him, no doubt it is a sufficient payment to the company to support the policy." In May on Insurance (section 360) it is said: "If the agent be authorized to receive the premium, an agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent." See, also, Behler v. Insurance Co., 68 Ind. 347; 11 Am. & Eng. Enc. Law, 308, 336; Insurance Co. v. Jenks, 5 Ind. 96. Moreover, in the case in hand the appellee must have known that the application was taken by Carpenter, as the words "Credit R. H. Carpenter" were written on the back of the application after it had passed from appellant's possession, and without his knowledge. Whatever knowledge this implied was possessed by the appellee when it received the application and indorsed it as accepted. Even if Carpenter was but a broker, he was still authorized to deliver the policy and receive the premium. Insurance Co. v. Hartwell, 123 Ind. 177, 24 N. E. Rep. 100; Criswell v. Riley, 5 Ind. App. 496, 30 N. E. Rep. 1101, and 32 N. E. Rep. 814. There is no contention that $2.50 was not the correct amount coming to the appellee after deducting the commission. In fact, as already intimated, the only complaint appears to be that Carpenter did not promptly turn over the money to the company. If, however, he was its agent for the purpose of delivering the policy and collecting the premium, as we think we have demonstrated he was, then the appellee is bound by the payment made to him, and the policy was in force when the appellant was injured. We, therefore, think the court erred in its conclusions of law, and in not rendering judgment in favor of the appellant. Judgment reversed, with instructions to the trial court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of appellant for $160 and interest from the 9th day of February, 1894.

NOTE.—*Insurance, Payment of Premium.*—It is usual, if not universal, for policies of insurance, when executed and delivered, to recite the payment of the premium therefor. And, in the ordinary course of business, the premium is paid to the agent who delivers the policy, whether he be a general, local recording, or soliciting agent. And the general rule is that payment of the premium to such agent when the policy is delivered by him is binding in the fullest sense on the company. If the agent have authority to collect the premium and deliver the policy to the assured, or if these duties be within the real or apparent scope of the authority of the agent, and the policy recites the payment of the premium, the same will be deemed in law to be paid, even though the cash may not be actually passed between the assured and the collecting agent, but an arrangement is agreed upon between them in satisfaction of the premium which results in the agent of the company crediting it with the amount of the premium in the usual

course of dealing, there being, of course, no fraud or collusion between the agent and assured. Home Insurance Company v. Gilman, 112 Ind. 7. The effect of such a delivery of the policy which, on its face, recites the payment of the premium, is to estop the company from denying the existence and binding force of the contract of insurance. *Id.* And where the agent with authority to collect the premium receives part of it in cash, and takes a written order or obligation from the assured to pay the balance at a certain future time in satisfaction of the premium, this will have the effect of payment, though the obligation stipulate that in the event of non-payment of such obligation, according to its tenor, all rights of the assured who was not the beneficiary in the policy, should be forfeited. It was held that such a stipulation did not affect the rights of the beneficiary, no fraud being shown. Cline v. Nat. Benefit Assn., 111 Ind. 462.

And in like manner, where the assured executes his promissory note in payment of the premium, this will have the full effect of a payment, and a stipulation in the note that the policy shall become absolutely void upon the failure to pay the note when due will not change such effect. National Benefit Assn. v. Jackson, 114 Ill. 533. And where the company by its course of dealing with the insured has often accepted payments of premiums shortly after they were due, without objection on account of payment not being made promptly at maturity, and the assured is thus lead to believe that payments would not be exacted precisely when due, who, as has become his habit in dealing with the company, does not pay one of the premium installments until past due, and dies while the premium is still unpaid, his beneficiary will be entitled to recover on the policy, the premium being tendered by his legal representatives within the time in which they had been usually paid in the life-time of the insured. Phoenix Mut. Life Ins. Co. v. Doster, 106 U. S. 30. And a stipulation in a policy that the assured was entitled to a paid up policy for a certain amount after four annual payments of the premium, will entitle him to such paid up policy though he gave his note for one of the premiums which at the time the paid up policy could be claimed was still unpaid. Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269. But in such case the company will have a valid off-set against the paid up policy for the amount remaining unpaid on the note. *Id.* But while an agent may ordinarily extend the time of payment of the premium for the insurance, or take a written obligation payable in money at a future day, he has no authority, express or implied, to take personal property in general, such as chattels, etc., in payment in whole or in part for the premium, and such a transaction would be a fraud on the company, chargeable to the assured, and would invalidate a policy founded on such consideration. Hoffman v. Ins. Co., 92 U. S. 161. But an agent could doubtless take any part of the premium to which he would be entitled as commission, in anything he might elect.

If the policy be delivered by the company itself or through its agent, without requiring the premium to be paid down in advance the law will raise a presumption that a credit was intended. Brooklyn Life Ins. Co. v. Miller, 79 U. S. 285. And if the general agent give credit for the premium which is by the company charged to his account after knowledge thereof, it is tantamount to a payment. *Id.* A requirement that the policy shall not take effect until the premium therefor is actually paid is legitimate and a non-compliance therewith will invalidate the policy unless the stipulation be waived, or the company by its acts, declarations or conduct, through its agents or other proper officers, estop itself from insisting on the forfeiture. Giddings v. Ins. Co., 102 U. S. 108. If the terms of the contract of insurance be agreed upon, and the agent of the company writes the applicant to "send him his check for the premium and the business was done," this is a payment from the time the check was deposited in the post office by the applicant in response to this request in a letter properly directed to such agent, and the company will be bound accordingly. Taylor v. Ins. Co., 9 How. 390. See, also, Calvin v. U. S. Mutual Acc. Assn., 66 Hun, 543. In a life insurance policy where the beneficiary was entitled to certain dividends which were to be applied as part payment of the premiums as they might fall due, and which dividends were uncertain and known only to the company itself, and it had long been the custom of the company to give notice of the amount of the dividend before each payment of premium should become due, the company will not be permitted to insist on a forfeiture by reason of the failure to pay the premium. Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156. Nor will a tender of the unpaid premium be necessary when the conduct of the company is such as to preclude the inference that the tender, if made, would be accepted. *Id.* But the fact that the insurance company may waive the forfeiture by reason of the non-payment of the premium according to stipulation, will not justify the assured in relying on a waiver in another contract with the same company. Hubbell v. Ins. Co., 100 N. Y. 41. Nor will the fact that the company has been in the habit of sending the assured notice of the time when his premium is due justify him in neglecting to pay same at maturity when the policy itself provides when the payments must be made and the amount thereof. Mandego v. Continental Mut. Life Assn., 64 Iowa, 134. But if the forfeiture by reason of the non-payment of the premium or any other ground of forfeiture, is once waived, the company cannot thereafter retract the waiver. Lycoming County Mut. Ins. Co. v. Schollenberger, 44 Pa. St. 259, 263; German Ins. Co. v. Gibson, 53 Ark. 494, 502; Richards' Ins., Sec. 62; Brink v. Ins. Co., 80 N. Y. 108.

If an insurance company takes notes for the premium in whole or in part, and by the contract of insurance the policy is to be void during such time any premium note is due and unpaid, the effect of a default in such payment is to suspend the life of the policy until payment is made. But the fact that the policy is temporarily inoperative will not prevent an action by the company on any such note that may become due and remain unpaid. Robinson v. Ins. Co., 51 Ark. 441.

It has been held that an agreement to renew a policy of insurance is not a waiver of a requirement of the policy that the premium be paid in advance. Taylor v. Phoenix Ins. Co., 47 Wis. 365. But it is difficult to see why the premium may not be waived. The case itself is crippled by an able dissenting opinion, and would, moreover, seem to deny the doctrine that an oral contract for insurance is binding, or that the company, through its agent, could waive the payment of the premium in advance or extend credit therefor. On the contrary, the best considered cases, and practically all the authorities on the subject, hold in unison that the fact the policy stipulates that it will be of no force until the premium is actually paid will not prevent the agent from waiving this provision or giving credit for the premium. Kerlin v. National

Acc. Assn., 8 Ind. App. 628; Home Ins. Co. v. Gilman, 112 Ind. 7; Kline v. Nat. Ben. Assn., 111 Ind. 467; Taylor v. Ins. Co., 9 How. 390; Elkinson v. Ins. Co., 113 Pa. St. 386; Lebanon Mut. Ins. Co. v. Humes, 113 Pa. St. 591; Ball & Sage Wagon Co. v. Ins. Co., 20 Fed. Rep. 232; Farnum v. Phoenix Ins. Co., 83 Cal. 246; Newark Machine Co. v. Ins. Co., 50 Ohio St. 549. Indeed, it is the general rule, supported by a long list of authorities, that the agent may waive forfeitures though the policy expressly stipulate that he has no such authority. New Orleans Ins. Assn. v. Mathews, 65 Miss. 312; Travelers' Ins. Co. v. Harvey, 82 Va. 949; O'Brien v. Ins. Co., 52 Mich. 131; Indiana Ins. Co. v. Copehart, 108 Ind. 270; Wheaton v. Ins. Co., 76 Cal. 415; Sprott v. New Orleans Ins. Assn., 53 Ark. 215; Lamberton v. Ins. Co., 39 Minn. 129; St. Paul Fire & Marine Ins. Co. v. Parsons, 47 Minn. 352; Ins. Co. v. McCrae, 8 Lea (Tenn.), 524; Follette v. Ins. Co., 107 N. C. 240; Ins. Co. v. Wilkinson, 13 Wall. 222; Kahn v. Ins. Co. (Wyo.), 34 Pac. Rep. 1059; Home Ins. Co. v. Gibson (Miss.), 17 South. Rep. 13; Mix. v. Ins. Co. (Pa.), 32 Atl. Rep. 480; Mut. Ben. Life Ins. Co. v. Robinson, 58 Fed. Rep. 723. The theory of the law is "there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." Ins. Co. v. Earle, 33 Mich. 143; Morrison v. Ins. Co., 69 Tex. 353; Lambert v. Ins. Co., 39 Minn. 129; Kahn v. Ins. Co. (Wyo.), 34 Pac. Rep. 1059; Firemens' Fund Ins. Co. v. Norwood, 69 Fed. Rep. 71. And the unquestioned trend of the decisions is to the effect that an insurance company, either through its principal officers or agents, may make a valid and binding contract of insurance by parol to the same effect as by instrument of writing, the contract, of course, not being for a period of time forbidden by the statute of frauds. Stickley v. Mobile Ins. Co., 37 S. C. 59; Davenport v. Ins. Co., 17 Iowa, 276; Audubon v. Ins. Co., 27 N. Y. 216; Angell v. Ins. Co., 59 N. Y. 171; Fish v. Cottinet, 44 N. Y. 538; Harron v. Ins. Co., 88 Cal. 6; Hardwick v. State Ins. Co., 23 Oreg. 290; Potter v. Phoenix Ins. Co., 63 Fed. Rep. 382; North British & Mercantile Ins. Co. v. Lambert (Oreg.), 37 Pac. Rep. 909; Newark Machine Co. v. Ins. Co., 50 Ohio St. 549; Sanborn v. Ins. Co., 16 Gray (Mass.), 448; Post v. Ins. Co., 43 Barb. 351; Relief Fire Ins. Co. v. Shaw, 94 U. S. 574; Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664. It follows, therefore, that an agent authorized to effect contracts of insurance may, on behalf of his company, waive the clause requiring the payment of the premium in advance. And the acceptance by the general agent of the company of the premium after default, will effect such waiver. Smith v. Ins. Co., 3 Dak. 80. And, likewise, where the company accepts payment of an overdue premium note, such clause will be thereby waived. Phoenix Ins. Co. v. Lansing, 15 Neb. 494.

W. C. RODGERS.

Nashville, Ark.

CORRESPONDENCE.

THE MODERN LAW OF SELF-DEFENSE.

To the Editor of the Central Law Journal:

There has been a universal tendency on the part of both the legal and lay journalists, to regard the late cases of State v. Evans (Missouri), Page v. State (Indiana), and Beard v. U. S., 15 S. C. Reporter, as recent innovations upon the antiquated doctrine of "retreating to the wall." (See 41 Cent. L. J. 185). This innovation is by no means recent. True, the effect of these cases will be to annihilate the rule as heretofore existing in the several States above named, but investigation discloses the fact, that they have followed the law relating to this phase of criminal jurisprudence as enunciated by the most enlightened courts of this country. The American jurists, ever alert to adopt such rules as will best promote the interests of society and secure to individuals that protection, which the law, in its eagerness and persistency to preserve human life, has from time immemorial dictated, and which the law of nature represents as its cardinal rule, viz: "Self-preservation is the first law of nature," have adopted a rule, which is suitable to the present condition of society in this enlightened age, and the application of it having produced salutary effects, has been followed and adhered to with a rigidity which characterizes the courts of America in their conservatism for decisions, the rendition of which are dictated by reason and common sense. The rule seems to be: "Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm." This rule was laid down by the Supreme Court of Ohio in the year 1877, in the case of Erwin v. State, 29 O. S. 186. And from the rule laid down by the same court in Martz v. State, 16 O. S. 162, I take it that the slayer is the sole judge of circumstances, whether his life is in such imminent danger, as will justify him in taking the life of his assailant; subject, of course, to an investigation by a jury. The jury are to consider all the facts and circumstances, placing themselves in the position of the prisoner at the time of the attack or killing; not to consider it as a sober man would, not a party to the affray, but placing themselves in the position of the accused, the circumstances (and I might add the previous reputation of the deceased for peace and quietness), and they are to say if the defendant was warranted in his action. Again the danger need not be real; where the prisoner labored under a *bona fide* belief that he was in danger of his life or great bodily harm and if the jury find the circumstances were such as to justify the belief though no actual danger existed, they must acquit. 3 W. L. G. 344. The reason of this rule is apparent. Modern science has made sweeping inroads upon the antiquated ideas of weapons useful in fight. An attempted escape from the range of a ball emanating from a modern weapon would increase, rather that lessen the danger. To compel him to flee would be to make him the victim of many treacherous persons, and subject him to great bodily harm entirely unwarranted by reason and by law and not justified by the law of nature, which is the root of our present state of laws as dictated by the one above. This rule is followed in a number of States.

HENRY G. HAUCK.

EQUITABLE CONVERSION.

To the Editor of the Central Law Journal:

There are two recent cases, one an American, the other an English, in addition to those cited by Mr. Murfree in his interesting article on Equitable Conversion in the issue of the JOURNAL of September 13, viz: Smith v. Loewenstein, 50 Ohio St. 346, 34 N. E. Rep. 159; Pyle v. Pyle, 1895, 1 Chan. 724. In the Ohio case L was lessee under a perpetual lease with privilege of purchase from lessor W. W intermarried with

T. and died intestate leaving her husband and a son E surviving her. The son died unmarried and intestate n 1872, the husband in 1884. In 1886 L, desiring to exercise the option of purchase, filed a bill of interpleader making the administrator of the lessor W and of her husband T and also heirs at law of the son E, parties as claimants to the fund: Held, that the property was not converted into personalty until the exercise by L of the option of purchase; that upon the death of the lessor, the premises were inherited by the son and upon his death passed by inheritance to his heirs at law as real estate; that the conversion into realty took place at the time the lessee exercised the option and did not relate back to the time of the execution of the lease; that the purchase money will go to the heirs of the lessor as between the heirs on the one side and the personal representatives of the lessor on the other. In the English case which was decided by Mr. Justice Stirling, a testator by will dated 1886, specifically devised certain freeholds and bequeathed his residuary real and personal estates to other persons. On June 10, 1890, he made a codicil confirming his will without mentioning the specifically devised property. On the same day he granted a lease of the property with option of purchase. Upon a summons raising the question whether the purchase money belonged to specific devisee or fell into the residue: Held, that whether the codicil was executed before or after the lease the testator must have known of the existence of the latter and by confirming his will had indicated sufficient intention to pass whatever estate he had in the property to the specific devisee so as to take it out of the rule established by Lawes v. Bennett.

MAX B. MAY.

Cincinnati, Ohio.

BOOK REVIEWS.

PINGREY ON REAL PROPERTY.

The author of this work, states in his preface that "it is an attempt to present the law of real property, as it is to-day, with its history and development. The advance of civilization in the United States" he says "has developed new estates, and made it necessary to apply established principles in a new manner. New sources of wealth have been discovered, giving new industries and presenting questions difficult to answer. Geologic and mineralogic developments have drawn upon the inventive genius of the people for mechanical devices to penetrate the earth, which have changed the uses and the values of land. To-day the owner of a farm may convey the coal to one man, the ore, or oil, or gas, or salt, to another, giving to each grantee a deed in fee-simple for his particular estate, while he retains the surface for settlement or cultivation. Each estate becomes subject to taxation, to incumbrance, to levy, and to sale, precisely like the surface held by the grantor. Under proper restrictions each of the different owners has the right, without any express words of grant for that purpose, to go upon the surface to open a way by drift, shaft, or well, to his underlying estate, and to occupy so much of the surface beyond the limits of his drift, shaft, or well, as may be necessary to operate his estate and to remove the products thus obtained. Under the modern conditions the surface of the land may be separated from under the strata, and these strata separated from each other, so there may be as many fee-simple as there are strata. In the United States wooded lands may be cleared and put into cultivation, and unopened mines developed by the life tenant when the exigencies of the case demand it. On these modern lines the author has endeavored to produce a complete and practical treatise on real property expository of the law; a treatise at once, serving the law student and the practitioner, thus doing away with the necessity of having one book in the law school and another in practice." The contents of the two large volumes are divided into three Parts, Part I, treating of the Creation of Estates, Part II, of the Classification of Estates and Part III, of the Transfer and Succession of Estates. Within these divisions of the subject are thirty-five subdivisions or chapters which treat in detail of the various points, which might naturally be found in a book of this character. The notes are very extensive and the citation of authorities are abundant. Without going into details it is sufficient to say that the author has performed his task in a painstaking and careful manner, and has rendered a real service to the profession. While not philosophical the work goes into the niceties of real estate law, and deals with the subject in a practical and satisfactory manner. The author has long been known as a law-writer of considerable talent having prepared satisfactory treatises on Chattel and also Real Estate Mortgages. The volume before us will add very much to his reputation. It is in the shape of two large volumes each of nearly eight hundred pages, well indexed and well printed. Published by, H. B. Parsons. Albany, New York.

AMERICAN ELECTRICAL CASES, VOL. 3.

We have heretofore taken occasion to speak of this series of reports and to commend them to those having interest in their subject. They purport to contain a collection of all the important cases decided in the State and Federal courts of the United States from 1873 on subjects relating to the Telegraph, Telephone, Electrict Light and Power, Electric Railway and all other practical uses of electricity. This latest volume of the series contains a number of important cases, to which there are appended exhaustive and valuable notes. The increasing uses of electricity and the rapid accumulation of questions and cases on the subject renders this series of special value. Published by Matthew Bender, Albany, N. Y.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACTIONS—Joinders of Actions.—Code, § 2672, providing that all actions on contract for the payment of money, whether under seal or not, may be united in

the same action, does not abrogate the common-law rule that counts for independent torts of the same nature, and on all of which the same judgment may be given, may be joined in separate counts in the same complaint.—LOUISVILLE & N. R. CO. v. COFER, Ala., 18 South. Rep. 110.

2. ADVERSE POSSESSION—Boundary.—Where a landowner, believing that his land runs to a certain line, retains possession up to such line, which is on the land of an adjoining owner, he does not hold adversely to such owner, there being no agreement between them that such line should be the dividing line between their lands, and the former never intending to claim any more land than belonged to him.—DAVIS v. CALDWELL, Ala., 18 South. Rep. 103.

3. APPEAL—Brief.—A brief merely setting out propositions of law, with authorities in support, without showing their applicability to the errors assigned, will be stricken out as in violation of Laws 1893, p. 127, and rule 12, requiring briefs to clearly point out errors relied on for reversal.—HAUGH v. CITY OF TACOMA, Wash., 41 Pac. Rep. 173.

4. APPEAL — Removal of County Seat. — Act 1893, March 11 (Laws 1893, p. 291), providing that "any person may appeal from any decision or order of the county commissioners to the superior court," does not authorize an appeal from an order directing the removal of the county seat. — LAWRY v. BOARD OF COM'RS OF SNOHOMISH CO., Wash., 41 Pac. Rep. 190.

5. APPEAL—Sufficiency of Notice.—Where the notice of appeal from the judgment of a Circuit Court on review of proceedings for location of a road shows on its face that the jurisdiction of the county court over the proceedings is involved, it need not specify the alleged errors of the Circuit Court as required by Hill's Code, §§ 537, 591, in order to give the Supreme Court jurisdiction.— CAMERON v. WASCO COUNTY, Oreg., 41 Pac. Rep. 160.

6. APPLICATION OF PAYMENTS— Secured Debts.—On foreclosure of a mortgage securing a note, the interest on which is guarantied by a third person, the mortgage is entitled to have proceeds of the sale applied in payment of the principal of the notes before the interest.—SMYTHE v. NEW ENGLAND LOAN & TRUST CO., Wash., 41 Pac. Rep. 184.

7. AWARD—Defenses.—In defense of an action on an award, or for not performing an award, the defendant may avail himself of any material error or defect apparent upon the face of the award,—such as excess of power by the arbitrators, or defect of execution of power, as by omitting to consider the matter submitted.—CLARK v. GOIT, Kan., 41 Pac. Rep. 214.

8. BAILMENT—Gratuitous Agent—Liability for Negligence.—One who receives money, and agrees to loan it without any charge, and to collect the interest and principal, is liable for its loss by reason of his negligence, where he loans it without security to one to whom he personally furnishes goods to enable him to start in business, and does not collect principal or interest when due for fear the borrower would become crippled, and unable to pay what he owed him personally.—SAMONSET v. MESNAGER, Cal., 41 Pac. Rep. 337.

9. BOUNDARIES—Distances.—Where three sides and the number of acres are known, and it is disputed whether the fourth side is a straight or meandering line, the straight line will be adopted, when the tract thus inclosed contains the number of acres called for, and when the acreage would be largely increased if the meandering line were adopted. — HOSTETTER v. LOS ANGELES TERMINAL RY. CO., Cal., 41 Pac. Rep. 330.

10. CARRIERS OF PASSENGERS—Negligence — Proximate Cause.—Before an act of negligence can be made the basis for a recovery of damages, it must appear that such act was the natural and proximate cause of the injury, or directly contributed thereto.—CHICAGO, K. & W. RY. CO. v. BELL, Kan., 41 Pac. Rep. 209.

11. CHATTEL MORTGAGES—Validity. —Chattel mortgages were executed in Kansas upon property located, and by persons residing, there, who afterwards removed to this territory, bringing the property with them. The law is that the rights of the parties to such chattel-mortgage contracts are to be determined by the law as it exists in the State or country where they were made and are to be performed.—RICHARDSON v. SHELBY, Okla., 40 Pac. Rep. 378.

12. CONSTITUTIONAL LAW—Legislative Powers—Railroad Commissioners.—Where a railroad commissioner holds over because of the failure of the legislature to elect his successors, the fact that he does not renew his official bond neither forfeits the office nor releases the sureties on such bond.—EDDY v. KINCAID, Oreg., 41 Pac. Rep. 156.

13. CONSTITUTIONAL LAW— Title of Act.—The act of March 16, 1895, to amend an act concerning the purchase and preservation of newspapers, in so far as it attempts to regulate the matter of legal advertising and printing, is in conflict with the provisions of the constitution (article 4, § 17), requiring that each law shall embrace but one subject, which shall be briefly expressed in the title.—STATE v. BOARD OF COM'RS OF WASHOE COUNTY, Nev., 41 Pac. Rep. 145.

14. CONTRACT—Time of Performance.—When time is not made the essence of a contract for payment by the performance of specific services, the party entitled to such services does not absolutely forfeit them by failing to require them within the time named in the contract.—KANOPOLIS LAND CO. v. MORGAN, Kan., 41 Pac. Rep. 205.

15. CONTRACT TO FLOAT STRANDED SHIP—Damages.—Where the captains of two tugs agreed with the owner of a stranded ship to try, for a certain sum, to float her, but did not guaranty to do so, and they made an unsuccessful attempt, wherein each tug broke its hawser, and, before other tugs could be secured, a storm arose which drove the ship so far ashore that it was impossible to float her, they are not liable to the shipowner for the difference in value of the wreck and the ship if floated.—BENJAMIN v. PUGET SOUND COMMERCIAL CO., Wash., 41 Pac. Rep. 166.

16. CORPORATION — Conspiracy of Officers—Receiver. —Where, in an action by a stockholder against the president of the company and others for conspiracy to defraud the company, judgment is rendered for plaintiff, it is proper to appoint a receiver to collect the judgment and distribute the proceeds in conformity with its terms.—FOX v. HALE & NORCROSS SILVER MIN. CO., Cal., 41 Pac. Rep. 328.

17. CORPORATION — Promoters.—Where certain persons procure a charter, and are named therein as the directors of a corporation for the first year, and, as such directors, elect themselves as officers of such organization, but no *bona fide* subscription of stock is ever made, and no arrangements made for the payment of debts or liabilities which may be incurred by such organization, the organization cannot be said to have such a corporate existence as would authorize its directors to incur any liability in the name of the corporation, and the persons so engaged in the enterprise are liable personally, as promoters thereof, for a debt incurred for material purchased by one elected by them as superintendent and general manager, and needed in carrying on the business for which such organization was formed.—WHETSTONE v. CRANE BROS. MANUF'G CO., Kan., 41 Pac. Rep. 211.

18. CORPORATIONS — Stockholders of Banks.—That part of Gen. St. 1894, § 2501, which provides that the stockholders of all banks of deposit and discount shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of the bank, and such individual liability shall continue for one year after a transfer of their stock shares, construed: Held, that the individual liability of a stockholder who, in good faith, has transferred his shares is confined and limited to such debts as have been created and incurred prior to the time of the transfer.—HARPER v. CARROLL, Minn., 64 N. W. Rep. 145.

19. CORPORATIONS — Withdrawal of Promoter.—A promoter of a corporation cannot, after the formation of the corporation, as contemplated in the preliminary subscription, revoke his subscription, as against a creditor of the corporation, though the other stockholders consent.—BALFOUR v. BAKER CITY GAS & ELECTRIC LIGHT CO., Oreg., 41 Pac. Rep. 164.

20. COVENANTS — Acquiring Title Before Suit.—In an action for breach of warranty, where it appears that when the deed was made defendant had no title, but acquired title before the suit was brought, plaintiff is entitled to only nominal damages, as the title acquired by defendant inured to plaintiff's benefit.—SAYRE v. SHEFFIELD LAND, IRON & COAL CO., Ala., 18 South. Rep. 101.

21. CRIMINAL LAW — Larceny —Where defendant was given property by the prosecuting witness to deliver at the latter's house, and defendant sold it, he is guilty of larceny.—HOLEBROOK v. STATE, Ala., 18 South. Rep. 109.

22. CRIMINAL LAW — Use of Interpreter.—Under Code Civ. Proc. § 1884, providing that an interpreter must be sworn when a witness does not understand the English language, the court is necessarily vested with a discretion which is not abused in refusing an interpreter to a foreigner charged with murder who appeared to sufficiently understand the language.—PEOPLE v. YOUNG, Cal., 41 Pac. Rep. 281.

23. CRIMINAL PRACTICE — Indictment—Verification.—The fact that a deputy clerk of court signs the jurat to the verification of an information in the name of the clerk, by himself as deputy, does not render the information insufficient.—STATE v. WHITE, Wash., 41 Pac. Rep. 182.

24. DECEIT — False Representations.—False statements and representations, to warrant an action for deceit, must be, generally speaking, as to a material fact or facts, susceptible of knowledge; and, if they appear to be mere expressions of opinion upon matters of conjecture and uncertainty, they are not actionable. But there are many cases in which the false assertion of an opinion will amount to fraud.—HEDIN v. MINNEAPOLIS MEDICAL & SURGICAL INST., Minn., 64 N. W. Rep. 158.

25. DEED — Mortgage—Boundaries.—A description in a mortgage extending the boundary line of the mortgaged land from a given point, by certain courses and distances, "to the mouth" of a certain creek, and "thence ascending said creek" by certain courses and distances, made the thread of the creek the boundary line, regardless of the last named courses and distances, even though the creek was a tidal stream, the grantor having title to its bed.—FREEMAN v. BELLEGARDE, Cal., 41 Pac. Rep. 289.

26. DEED — Presumption of Delivery.—The presumption, declared by C'vil Code, § 1055, that a deed duly executed was delivered on the day of its execution, is not overcome by the fact that it was not acknowledged until six months after its execution.—GORDAN v. CITY OF SAN DIEGO, Cal., 41 Pac. Rep. 301.

27. DEED — Purchase by Plat — Estoppel.—One who purchases a lot by a plat is estopped to claim, as an upland owner, tide lands beyond the lines of the lot.—STATE v. FORREST, Wash., 41 Pac. Rep. 194.

28. ELECTION—Removal of County Seat—Estoppel.—A canvassing board of election returns is not estopped, by having assumed to canvass the returns for vote on change of a county seat, from subsequently denying that they had authority to canvass such returns.—STATE v. WHITNEY, Wash., 41 Pac. Rep. 189.

29. EVIDENCE—Opinion.—Whether an inexperienced man, who had never been instructed as to coupling cars having a certain coupling apparatus, could couple them the first time attempted, is not a fact which a witness can testify to, but a matter of deduction or inference to be drawn by the jury from facts and circumstances in evidence.—BOLAND v. LOUISVILLE & N. R. CO. Ala., 18 South. Rep. 99.

30. EVIDENCE—Parol Evidence—To Vary Liability on Note.—Where purchase-price notes are given under a written contract that the seller shall deliver the property to a corporation to be composed of the makers, parol evidence is inadmissible to show a contemporaneous agreement that the notes should not be binding on the makers after the corporation was formed.—GURNEY v. MORRISON, Wash., 41 Pac. Rep. 192.

31. EXECUTION AGAINST DECEDENT'S ESTATE.—The right given to judgment creditors to have executions issued to enforce the collection of money judgments after the decease of judgment debtors is limited to cases where, and such executions can only be levied upon real property on which, a lien has been acquired prior to the death of the debtor.—BYRNES v. SEXTON, Minn., 64 N. W. Rep. 155.

32. EXECUTION SALE—Sale in Bulk. — An execution sale cannot be set aside, because the land was sold in bulk instead of in parcels, in a court of law, after deed has been made to the purchaser and he has paid the purchase price and removed liens on the property, as the deed can be annulled and the purchaser's interests protected only by a court of equity.—ANNISTON PIPE WORKS v. WILLIAMS, Ala., 18 South. Rep. 111.

33. FRAUDULENT ASSIGNMENT. — Where a sheriff makes return on attachment levied in a suit against a debtor, commenced after an assignment by such debtor, to which the assignee is not a party, of no property to satisfy the attachment except the property attached, which is embraced in an alleged assignment, and it appears that an action at law is pending by the assignee against the attaching creditor for conversion in making the attachment, to which the debtors are not parties, a bill in equity will lie to remove the assignment as an obstruction to execution on a judgment for plaintiff in such action, on the ground that it is fraudulent.—MERCHANTS' NAT. BANK v. GREENKOOK, Mont., 41 Pac. Rep. 250.

34. HOMESTEAD—Right of Widow to Allotment.—The existence of a judgment lien on property superior to the homestead right of the widow does not deprive the widow of the right to a homestead allotment.—JACKSON v. SHEFFIELD, Ala., 18 South. Rep. 106.

35. INJUNCTION—County-Seat Election.—Gen. St. tit. 38, ch. 3, provides that the county commissioners shall canvass the votes at an election for the removal of a county seat, ascertain the results, and declare that the requisite number of votes has been cast; and the place selected shall be the county seat: Held, that equity could enjoin the removal of a county seat for fraud of the board of commissioners in canvassing the votes and declaring the result of the election.—KRIESCHEL v. BOARD OF COM'RS OF SNOHOMISH COUNTY, Wash., 41 Pac. Rep. 186.

36. INJUNCTION—County Warrants—Election.—A decree enjoining the payment of county warrants as issued in excess of the authorized indebtedness, without a vote of the people, becomes ineffectual, on the warrants being validated by a subsequent vote.—WILLIAMS v. SHOUDY, Wash., 41 Pac. Rep. 169.

37. INJUNCTION — Restraining Enforcement of Ordinance.—Injunction will not lie to restrain a city and its proper authorities from proceeding to enforce and punish, by fine and imprisonment, the violation of an ordinance which provides that, before any persons shall conduct a private or public auction, or conduct the business of selling bankrupt or other stock of goods at public or private auction, such persons shall pay the sum of five dollars per day to the city treasurer for each day such business is carried on, and that the violation thereof shall be considered a misdemeanor, and shall be punished by fine and imprisonment.—GOLDEN v. CITY OF GUTHRIE, Okla., 41 Pac. Rep. 350.

38. INSURANCE — Conditions of Policy—Ownership.—Where a wife was owner of a business carried on under the name S & Co., and her husband represented in an application for insurance on the property of the business that he was owner, the application requiring a truthful statement of the ownership of the insured

property, the wife cannot recover on a policy issued in the name S & Co.—PELICAN INS. CO. v. SMITH, Ala., 18 South. Rep. 105.

39. JUDGMENT—Acceptance of Part—Waiver.—Where the complaint, in an action on a note, alleged that a certain amount was a reasonable attorney's fee, and the answer put in issue all the allegations of the complaint, and plaintiff's offer to prove the reasonableness of the fee was refused, and judgment was rendered for him for the amount of the note but not the fee, by receiving a payment on the judgment he waived his right to appeal from the denial of the counsel fee.—BUSH v. MITCHELL, Oreg., 41 Pac. Rep. 155.

40. JUDGMENT—Death of Party Pending Suit.—Code Civ. Proc. § 669, providing that if a party die after decision and before judgment the court may render judgment on the decision, does not deprive courts of authority, when a party dies after the submission of a case but before its decision, to order the findings to be filed *nunc pro tunc* as of the date of submission.—FOX v. HALE & NORCROSS SILVER MIN. CO., Cal., 41 Pac. Rep. 328.

41. MARINE INSURANCE—Construction of Policy.—A policy of marine insurance, containing a printed clause which prohibited the vessel from certain waters including the Gulf of Campeachy, had written into it the amount of insurance, the name of the vessel, and the terms of the policy, after which was written the words "Excluding the Gulf of Campeachy:" Held, that the written words were not for the purpose of qualifying the printed clause, but for calling particular attention to the Gulf of Campeachy, near which the vessel was when insured.—PARKER v. CHINA MUT. INS. CO., Mass., 41 N. E. Rep. 269.

42. MARRIAGE—Authority to Perform.—The fact that the person performing a marriage ceremony in California in 1858 was not authorized to perform such ceremonies would not invalidate the marriage, if assented to by the parties and consummated by cohabitation as husband and wife.—HUNTER v. MILAM, Cal., 41 Pac. Rep. 332.

43. MARRIED WOMAN— Contract as to Payment.—To an action by a married woman to recover wages for her personal labor, not rendered in the family of her husband, the defendant pleaded payment by the sale of a horse to her and her husband jointly, and that, as a consideration for the sale, she agreed that her wages might be applied in payment for the horse.—STRICKLAND v. HAMLIN, Me., 32 Atl. Rep. 732.

44. MASTER AND SERVANT— Dangerous Machinery—Warning of Danger.—An employer who knows that a need of warning an inexperienced servant, working on a dangerous machine has arisen, is bound to give it, though the danger arose from the negligence of a fellow-servant.—BJBJIAN v. WOONSOCKET RUBBER CO., Mass., 41 N. E. Rep. 265.

45. MASTER AND SERVANT— Mining— Safe Place to Work.—Where a miner is engaged in running a tunnel, drilling and blasting from its face, the employer is bound to furnish a safe place for work, by using proper precautions to prevent the falling of the roof of that part of the tunnel already created, and by keeping the floor so free from debris as not to obstruct his escape in case of accident.—KELLEY v. FOURTH OF JULY MIN. CO., Mont., 41 Pac. Rep. 273.

46. MECHANICS' LIENS—Enforcement—Repeal of Statute.—The right to a mechanic's lien for materials becomes, when the materials are furnished, a vested right, which the legislature cannot destroy; but the remedies provided to preserve and enforce such lien may be changed, if a substantial and effective remedy is left or provided, and the change does not substantially impair the value of the contract or security.—GROESBECK v. BARGET, Kan., 41 Pac. Rep. 204.

47. MINING—Conversion of Bullion.—The doctrine that everything will be presumed against a spoliator does not apply to an action by a stockholder of a mining company against a milling company for improperly extracting the bullion, so as to leave a large quantity in the ore to be afterwards worked over by defendant, because, in the process of milling, the identity of the ore was destroyed.—FOX v. HALE & NORCROSS SILVER MIN. CO., Cal., 40 Pac. Rep. 308.

48. MINING PARTNERSHIP.— The defendants, with others, were the owners of a mine, which was being worked by the plaintiff under an agreement that the ore extracted should be worked in a mill belonging to defendants, and the proceeds divided as follows: The defendants were to be paid $25 per ton for milling; the plaintiff was then to be paid the expense of extracting the ore; and the balance was to be divided equally between him and the owners of the mine: Held, that these parties were simply tenants in common of the ore and its proceeds, and no partnership existed between them.—VIETTI v. NESBIT, Nev., 41 Pac. Rep. 151.

49. MORTGAGE.—Foreclosure— Conclusiveness of Decree.—Where an administrator was regularly before the court in a forclosure suit, his successors cannot, in ejectment by him against the purchaser at the foreclosure sale, claim that the foreclosure decree is invalid because the administrator failed to answer, and no decree *pro confesso* was taken against him.—HUNTER v. SHELBY IRON CO., Ala., 18 South. Rep. 107.

50. MORTGAGE — Growing Crops— Rights of Mortgagees.—As between mortgages upon separate undivided shares of a growing crop, the date of the execution, delivery and filing of the same is immaterial. The mortgagees have the rights of tenant in common. If a portion of the crop is destroyed by the elements, or is appropriated by a wrongdoer before a division, the balance is to be divided between the mortgagees as if none had been lost or misappropriated, and according to the interests as fixed in the mortgages.—MCRAE v. O'HARA, Minn., 64 N. W. Rep. 146.

51. MORTGAGES—Right to Crop—Bailment.—Where a landowner executed a mortgage on the land, and afterwards one on the crop, for advances to enable him to raise the crop, and, on default, surrendered possession of the land to the mortgagee thereof, who appointed him his agent to gather the crop, the crops belongs to the mortgagee of the land, as against the mortgagee of the crop, though the former, before taking possession, received in payment for provisions part of the money advanced by the latter, knowing the purpose for which it was advanced, and that it was secured by a mortgage on the crop.—THOMPSON v. UNION WAREHOUSE CO., Ala., 18 South. Rep. 105.

52. MORTGAGE OF ONE PARTNER'S INTEREST.—A mortgagee takes no greater right or interest than the mortgagor had, and, as one partner cannot take possession of the partnership property, neither can his mortgagee do so.—ALDRIDGE v. ELERICK, Kan., 41 Pac. Rep. 199.

53. MUNICIPAL CORPORATIONS — Limit of Indebtedness.—Under Const. art. 8, § 6, prohibiting a municipal corporation from becoming indebted to an amount exceeding 5 per cent. on the value of its taxible property, such value to be ascertained by the last assessment, and also prohibiting it from becoming indebted in an amount exceeding 1 1-2 per cent. of such assessment without the assent of three fifths of its voters, where a city, without an election, issued warrants which did not increase its debt above 5 per cent. on the amount of the last assessment, and an election was held at which the bonds were validated, the fact that, when figured on the assessment made just previous to the election, the warrants would make the debt exceed 5 per cent. thereof, is immaterial, as the election related back to the time the warrants were issued.—WEST v. CITY OF CHEHALIS, Wash., 41 Pac. Rep. 171.

54. NEGLIGENCE.—Where a servant unlawfully leaves his master's horse and wagon in the street, unhitched, and the horse strolls away, and upsets a ladder erected in the middle of the street, upon which plaintiff is working, the failure of plaintiff to have some one guard the ladder is not such contributory negligence as will bar a recovery from the master.—JONES v. BELT, Dela., 32 Atl. Rep. 728.

55. NEGOTIABLE INSTRUMENTS—Alteration.—Where a note was altered after delivery by an agent of the payee, without the maker's knowledge, by an interlineation of the words "with interest at six per cent.," which occupied only half a line and appeared to have been interlined, no recovery could be had thereon by a subsequent holder for value of either interest or principal alone.—GETTYSBURG NAT. BANK v. CHISOLM, Penn., 32 Atl. Rep. 730.

56. NEGOTIABLE INSTRUMENT — Note—Failure of Consideration.—D and F entered into a contract by which D agreed to build certain blind ditches on F's land under a warranty that they would carry off all surplus waters, and with a further agreement that, if they did not fulfill the conditions of the warranty, D would return, and dig open ditches in their place. The blind ditches failed to carry off the water, and were worthless for all purposes. D left the State, and the open ditches have not been dug: Held, in an action on a note given by F to D when the blind ditches were built, that there was a total, not a partial, failure of consideration for the note, and a complete defense to it.—SLATER v. FOSTER, Minn., 64 N. W. Rep. 160.

57. OFFICERS — Employment of Deputies.—Gen. St. § 2973, provides that, in all cases where the duties of any officer are greater than can be performed by him, he may employ, "with the consent of the county commissioners," the necessary help, who shall receive a just compensation. Section 3003 provides that, where the salary of any officer is inadequate for the services required, the board "may allow" such officer a deputy or such number of deputies as "in their judgment" may be required: Held, that the power to allow an officer a deputy is solely discretionary with the board of commissioners, and, on their refusal to allow a deputy, the officer cannot employ one himself, and recover from the county a reasonable compensation paid for his services, though the officer cannot personally perform all the duties of his office.—DILLON v. WHATCOM COUNTY, Wash., 41 Pac. Rep. 174.

58. PUBLIC LANDS — Adverse Claimants—Homestead Filing.—The forcible entry and detainer act of this territory does not provide an adequate and speedy remedy to a person who is entitled to the exclusive and immediate possession of land covered by his homestead entry, and it is the duty of the courts, when called upon, to issue an injunction, mandatory and prohibitory, to restrain a person whose homestead entry has, by the land department, been canceled—First, to compel such party to yield up and surrender possession of land; and, second, to prohibit him from interfering with the possession of the person who has the homestead filing for such land.—WOODRUFF v. WALLACE, Okla., 41 Pac. Rep. 357.

59. PUBLIC LANDS—Homestead — Mandatory Injunction.—Mandatory injunction is a proper remedy to protect the possession of one having a valid homestead entry on public land against persons who are trespassing on the land.—REAVES v. OLIVER, Okla., 41 Pac. Rep. 353.

60. PUBLIC LAND—Patents—Conflicting Claims.—One who has taken no appeal from the action of the United States land department, in canceling his declaratory statement to pre-empt land, and who, after the land had been listed to the State, made no formal objection to the issuance of a patent to another under a claim that the land was not suitable for cultivation, though he had also made application therefor to the State, has no *status* from which to hold the patentee as his trustee, on the ground that the land was suitable for cultivation, and that he and not the patentee has been in possession as required by law.—DREYFUS v. BADGER, Cal., 41 Pac. Rep. 279.

61. RAILROAD COMPANIES—Liability for Stock Killed.—Under R. L. § 3412, providing that, till a railroad company shall construct cattle guards at crossings sufficient to prevent cattle from getting on its track, it shall be liable for damage to cattle from its trains, where a horse gets on a track because of defective cattle guards the company's liability is not affected by the fact that a person leading the horse along a highway negligently permitted it to escape.—HARWOOD'S ADM'X v. BENNINGTON & R. RY. CO., Vt., 32 Atl. Rep. 721.

62. RAILROAD COMPANY—Right to Cross Tracks of Another.—A railroad company will not be denied the right to cross the tracks of another company merely because the crossing will necessitate the raising of the grade of the latter's road 18 inches, where the new grade is necessary because of another crossing.—BUTTE, A. & P. RY. CO. v. MONTANA U. RY. CO., Mont., 41 Pac. Rep. 248.

63. SALE—Implied Warranty.—When a dealer in feed sells oats to a livery man, for the purpose of being fed to his livery horses, and such purpose is known to the seller at the time of the sale, and the vendee does not examine or inspect the oats, there is an implied warranty that the oats are reasonably fit for the purpose for which they are intended; and if such oats contain castor beans, a poisonous substance when fed to horses, this constitutes a breach of the warranty, for which an action will lie.—COYLE v. BAUM, Okla., 41 Pac. Rep. 389.

64. SPECIFIC PERFORMANCE — Dower—Sale of Land.—In this State a wife, during the life of her husband, has an inchoate interest in all the real estate in which her husband has a legal or equitable interest, including real estate which her husband holds under a contract of sale; and an assignment of such contract by the husband alone, when the wife, at the time of such assignment, is a resident of this State, does not divest her of such interest; and the assignee of such contract so assigned cannot maintain an action against the vendor to compel the specific performance of such contract, by the execution of a warranty deed conveying to such assignee the absolute fee-simple title to the land contracted to be conveyed.—UNION PAC. RY. CO. v. BARNARD & LEAS MANUF'G CO., KAN., 41 Pac. Rep. 201.

65. STATUTES — Amendatory Statute—Title.—Under Const. art. 4, § 21, providing that "no act shall be amended by mere reference to its title," which necessitates reference to the title of the act to be amended, Act June 3, 1895, entitled "An act to amend section 33 of an act entitled approved March 6, 1865, and added supplemental sections thereto approved March 8, 1873, being section 4424 of the Revised Statutes of 1881," is not sufficient to amend, Act March 8, 1873, § 2, which amended and took the place of Act March 6, 1865, § 33, and became Rev. St. § 4424.—BORING v. STATE, Ind., 41 N. E. Rep. 270.

66. STATUTES — Construction. — The intention of the legislature governs the construction of a statute, and, if that requires a change in the punctuation, or even in the wording, of the statute, such change must be made.—STILES v. CITY OF GUTHRIE, Okla., 41 Pac. Rep. 383.

67. TROVER — Evidence. — In an action of trover, where plaintiff claim that defendant got possession of the goods by inducing him to leave the State through false statements that he was to be arrested for bigamy, it was proper to permit plaintiff to testify that defendant told him, if he did not leave town he would be arrested, as the sheriff was after him. — BROOKS v. GUYER, Vt., 32 Atl. Rep. 722.

68. VENDOR AND PURCHASER—Covenant to Give Title—Default.—A vendor is not in default on a covenant to give warranty deed on payment of the price, merely because, before final payment, a mortgage on the land was foreclosed; but the purchaser must tender balance of purchase money and a deed for execution.—PATE v. MCCONNELL, Ala., 18 South. Rep. 98.

69. WATERS — Reclamation of Swamp Lands.—In an action by a reclamation district to recover an assessment, defendant may show that his land was not benefited by the reclamation works, and that it was excessively assessed.—LOWER KING'S RIVER RECLAMATION DIST., NO. 531 v. PHILLIPS, Cal., 41 Pac. Rep. 335.